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CASE # _____

In The Supreme Court Of The United States

October Term, 1996

ALBIN A. RHOMBERG, JOHN BURNS, MICHAEL BURNS, THERESA REALI, SCOTT KILEY, JACK COOKE, JOSEPH SCHEIDLER, AND ESTATE OF JOHN SZABO,*

PETITIONERS

vs.

PETE WILSON; BOB WHITE; MARTY WILSON; PETE WILSON FOR GOVERNOR CAMPAIGN COMMITTEE; PETE WILSON INAUGURAL COMMITTEE; RUSSELL COLLIAU; KAREN MCGAGIN; TOM COOPER; DUANE LOWE; MONTEY HENSLEY; JAMES PENNELL; R. BARTUCCO; J.E. EVERETT; P.D. HARDER; W.E. MACDONALD; A. PEREZ; D.H. PETERS; PETER OSTERGAR; DANIEL LUNGREN, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; CITY OF SACRAMENTO; GREGORY TWILLING; & P. DOWDEN,

RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI with Appendix

JAMES JOSEPH LYNCH, JR
ATTORNEY AT LAW (SBN 85805)
1562 RESPONSE DR., SUITE 3103
P. O. BOX 336
SACRAMENTO, CA 95812-0336
OFFICE: (916) 448-7871
FAX: (916) 448-0549

COUNSEL FOR PETITIONERS

* The following dropped out in the lower courts: Charles Shunk, Richard Szabo, and Laurette Elsberry.

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THE QUESTIONS PRESENTED FOR REVIEW

1. Was recusal required where, prior to the filing of the lawsuit, the trial judge was an attorney for one Respondent for a significant portion of his legal career, and another Respondent, as U.S. Senator, played an essential and active role in the judge's nomination to the U.S. District Court?

2. Do Catholics, who believe in the sanctity of human life, have standing to assert the rights of the Unborn where, in their own Cathedral, they are arrested for praying for their faith, the Unborn, and the repentance of a pro-abortion governor-elect?

3. Are the Unborn "persons" in the Constitutional sense by virtue of the term "Posterity," as used in the Preamble of the Constitution of the United States, and therefore entitled to defend their lives, and to be defended by third persons, such as the Petitioners in this case?

4. Are Penal Code §§ 145 and 302 repugnant to the 1st Amendment when used to arrest and remove Catholics, who believe a pro-abortion governor-elect celebrating his inauguration in their Cathedral is a sacrilege, praying for their faith, and the repentance of the governor-elect, in the absence of violence or threats thereof?

5. Is there sufficient evidence raising genuine triable issues of fact that either Pete Wilson, Robert White, or both, deprived Petitioners, or caused Petitioners to be deprived of, federally protected rights in the arrest and removal of Petitioners from a Cathedral by virtue of their personal presence, right of control over other Respondents, and direct evidence they controlled the activities of other Respondents?

6. Does good faith depend on the facts observed in the arrest of Catholics in their Cathedral, rather than on the status of state law or the good faith of another person?

7. Did the trial court mislead the jury by following its decision on cross-motions for summary judgment, thus precluding the jury from considering the rights of the Petitioners to be present in the Cathedral to protect their religious beliefs, the rights of the Unborn, and their standing to protect the rights of the Unborn?

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PETITIONERS

vs.

PETE WILSON; BOB WHITE; MARTY WILSON; PETE WILSON FOR GOVERNOR CAMPAIGN COMMITTEE; PETE WILSON INAUGURAL COMMITTEE; RUSSELL COLLIAU; KAREN MCGAGIN; TOM COOPER; DUANE LOWE; MONTEY HENSLEY; JAMES PENNELL; R. BARTUCCO; J.E. EVERETT; P.D. HARDER; W.E. MACDONALD; A. PEREZ; D.H. PETERS; PETER OSTERGAR; DANIEL LUNGREN, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; CITY OF SACRAMENTO; GREGORY TWILLING; & P. DOWDEN,

RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

There are no reported opinions below. The opinion of the 9th Circuit appears in the appendix at page A1.

JURISDICTIONAL STATEMENT

1. The decision of the Ninth Circuit affirming the district court was entered on February 18, 1997.

2. Petitioner believes that 28 U.S.C., § 1254(1) and 2101(c) and Supreme Court Rule 13.1 confer *jurisdiction* on this court because the petition seeks review of an action within 90 days of the entry of judgment.

STATUTORY PROVISIONS INVOLVED

The following are involved and set out in the appendix:
The Preamble, p. A9.
The First Amendment, p. A10.

The Fourth Amendment, p. A10.
The Fourteenth Amendment, p. A10.
California Penal Code, § 142, p. A10
California Penal Code, § 302, p. A11
California Penal Code, § 834, p. A 12
California Penal Code, § 836, p. A 12
California Penal Code, § 837, p. A 12

JURISDICTION OF DISTRICT COURT

Jurisdiction of the district court was invoked under 28 U.S.C., § 1343(a)(3).

STATEMENT OF THE CASE

A. INTRODUCTION

This case involves the arrest of Catholics in the Cathedral of the Blessed Sacrament in Sacramento, California, by Respondents acting under color of law on January 6, 1991.

Pete Wilson was elected governor of California at the November 1990 elections. A number of events were organized to celebrate his inauguration. One event was an Event to be held in the Cathedral on Sunday, January 6, 1991, the Feast of the Epiphany, a special day celebrating the visit of the Magi to the Christ Child. To accommodate the Event, the regular 10:00 a.m. Mass was relocated to the basement.

Petitioners disagreed with the decision to: permit the Event in the Cathedral; allow a 'pro-abortionist' use of the Cathedral; and move the Mass to the basement. It upset them to think a 'pro-abortionist' could take precedence over a Mass, and concerned the Blessed Sacrament, the center of their religion, would be present at the Event. These are Catholic concerns, not political ones. It is not surprising in the days prior to the Event, outraged parishioners and other Catholics attempted to have the Event moved elsewhere.

The Pete Wilson Inaugural Committee (hereinafter, Inaugural Committee) had overall responsibility for the Event, while State police were responsible for security. These two groups appointed a head usher with no connection with the Cathedral, to make citizens' arrests if there was, in the usher's opinion, a disturbance. City and State Police worked together for crowd control outside, and to provide a paddy

wagon. The Church was represented in some of these discussions, and made it clear they would not approve the arrest of Catholics in the Cathedral.

There were three opinions as to the nature of the Event. Bishop Quinn thought the Event was a religious service, not to honor Gov. Wilson, but to pray for him and his administration for guidance. (Excerpt,[1] pp. 697, 710, (Rhomberg) 549, (Video, KCRA Segment) 567.) Petitioners, opposed to abortion,[2] felt it was a Sacrilegious Event and a scandal because the public might misinterpret the Church's position[3] on abortion.[4] (Excerpt, p. 711-12.) Respondents felt the Inaugural Event was primarily a government function. (Excerpt, pp. 712, (Robert White) 419.)

At the beginning of the Event, as the clergy were processing from the door to the altar, they were stopped near the door, while a number of people in the front pews were arrested and removed from the Cathedral because they prayed the "Our Father," a religious prayer. Towards the end, as concluding prayers ended, one person appended a prayer reflecting pro-life views and was arrested. After the clergy had left the altar, and the P. Wilson party was departing, one more asked him to change his views on abortion, and he was arrested. All of the arrests were for violating California Penal Code § 302, disturbance of a religious assemblage. See App., p. 11.

The Petitioners engaged only in prayers, some quietly,

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[1] "Excerpt" refers to the record as filed in the Ninth Circuit pursuant to Local rule in lieu of an Appendix of the Record. The following convention is used: (Excerpt, pp. (Name of Person Involved) page (fact), page (fact); (Name) page (fact), etc.)

[2] A Catholic who believes in the teachings of the Church would have to be against abortion. (Excerpt, p. 710.)

[3] A fear which appears to have materialized in view of the public comment of Marie Saroyan, "... a fine event to honor our new governor . . ." (Exhibit P-16, Video Tapes, KCRA Segment, 0:00:29:00.)

[4] It does not offend the Establishment Clause of the 1st Amendment merely because civil enforcement corresponds to the tenants of some religious belief. *Generally, Harris v. McRae* (1979) 448 U.S. 297, 319, 320; *Witters v. Washington Dept. of Social Svcs for the Blind* (1986) 474 U.S. 481. Stated otherwise, that the Fifth Commandment (Exodus 20:13.), in Judeo-Christian ethics, prohibits taking human life does not prevent civil enforcement of murder laws or feticide.

some moderately loud. There was no violence, and no express words uttered regarding abortion, until the end. Thus, this case is essentially one of wrongful arrest, based on speech, prayer, protected by the 1st, 4th, and 5th Amendments, which cannot amount to a crime, excessive force and false imprisonment, by the respondents acting under color of law in an effort to silence the pro-life voice.

The respondents' defense to liability was a claim they either had probable cause, or acted in good faith reliance on §§ 145 or 302, and therefore they are immune.

B. PROCEDURAL HISTORY

A civil rights action under 42 U.S.C., § 1983, etc., was filed on January 6, 1992. Amended complaints were filed on 4/24/92, 11/9/92, and 9/9/93. (Excerpt, pp. 1542, 1549, 1554.) The issues raised here are raised by the pleadings.

On March 18, 1994, Petitioners moved, amended on March 19, to recuse Judge Burrell. (Excerpt, p. 1559.) On April 8, 1994, the only opposition to be filed was filed by the Pete Wilson for Governor Campaign Committee (hereinafter, Campaign Committee), Inaugural Committee, Colliau, M. Wilson, and Tom Cooper. (Ibid.) On April 15, 1994, Petitioners filed a timely reply. (Excerpt, p. 1559.) On May 17, 1994, Judge Burrell denied the motion. (Excerpt, p. 1560.) A petition for writ of mandate in the Ninth Circuit was denied on or about March 13, 1995. (Excerpt, p. 1574.)

On May 27, 1994, Wilson and White moved for summary judgment, raising immunity issues. (Excerpt, p. 1562.)

On June 17, 1994, Lungren and Lowe moved for summary judgment solely on issues relating to §§ 145 or 302 and standing. (Excerpt, p. 1562.)

On June 24, 1994, the City Of Sacramento (hereinafter, Sacramento), Dowden and Twilling each moved separately for summary judgment, raising immunity and good faith defenses. (Excerpt, pp. 1563-64.) The Campaign Committee, Inaugural Committee, Colliau, Dan Schnur, M. Wilson, Tom Cooper also moved for summary judgment relating to immunity and good faith. (Excerpt, p. 1564.) The State Police Officers, Everett, Harder, MacDonald, Perez, Peters, Oster-

gar, and Pennel also moved for summary judgment relating to immunity and good faith. (Excerpt, p. 1565.)

On August 5, 1994, the court consolidated all motions and reset them to be heard on September 12, 1994, and eventually, the matter was heard and submitted on January 5, 1995. (Excerpt, p. 1567, 1573.) All motions were met with timely oppositions and replies. The court filed its order on February 23, 1995. (Ibid.) Petitioners moved for reconsideration on March 6, 1995. (Excerpt, p. 1574.)

During the trial, just before the jury was instructed, petitioners objected to the jury instructions given.[5]

On or about June 28, 1995, all Petitioners,[6] except Albin Rhomberg, settled with the Wilson Campaign Committee, the Wilson Inaugural Committee, Martin Wilson, Tom Cooper, and Russell Colliau only. (Excerpt, p. 1584.)

C. SUMMARY OF MATERIAL FACTS

1. The Cathedral, And Coordination

The Cathedral of the Blessed Sacrament is located 1 block from the State Capitol. On Friday, January 4, 1991, Msgr. James Kidder, pastor, met with members of the Inaugural Committee and State Police. (Excerpt, (MacDonald) 166-67, (Report) 952-55, (Colliau) 114, (Cooper) 1133-34, (Hensley) 1143, (Everett) 1132-40.) During the meeting (See post, at page 5.), security and a copy of an Anti Desecration League letter were discussed. Abortion protests were anticipated at the Event. (Excerpt, pp. (Everett) 1139, (Hensley) 1142, 1142A, 1144-49, (Quinn) 1189.) Msgr. Kidder told those present he did not want arrests. (Excerpt, pp. 869, 1166.)

2. Petitioners' Activities Prior to Event

Petitioners are Catholic, and therefore "pro-life." (Excerpt, p. 675, 711-12.) About a week before the Event, a number of Catholics learned of the Event and began calling

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[5] The Ninth Circuit held there was no objection. That is error. Both the trial record and the appellate record show two objections were made orally, and one in writing. (Excerpt, pp. 1503-04, 1507-08.)

[6] In fact, these Petitioners and Respondents settled before trial, but not finalized until after trial. The record is not very clear with respect to the settlement.

and informing other Catholics of what was happening and invited them to the 8:00 a.m. mass (hereinafter, Mass) before the Event, and to remain and pray after the Mass. (Excerpt, pp. 673-75, (R. Szabo) 526, (Cooke) 574, 1106, (Scheidler) 562, (M. Burns) 553, (Shunk) 208, (Kiley) 1169-76, (J. Burns) 614, 1053-54.) There were concerted efforts, by peaceful means, to move the Event elsewhere. (Excerpt, p. 1206-13, 1419.)

Prior to the Event Scheidler called and asked Msgr. Kidder to add a prayer for the Unborn, to ameliorate any misunderstanding about the Church's position on abortion. Msgr. Kidder left the impression he would do so. (Excerpt, pp. (Scheidler) 1215-18.) J. Burns also called the Chancery and left a message for the Bishop complaining about the Event in the Cathedral. (Excerpt, p. 1055.)

Each of the Petitioners planned to attend the Event to pray, but had not planned to demonstrate, create a disturbance, or to express their opposition to the Event in the Cathedral. (Excerpt, pp. 520-640, (Cooke) 304, 1108, 1110-11, 1118A, 1118B, (Shunk) 1225, (J. Burns) 1043, 1059, 1063-65, (J. Burns) 929-23.) They decided to attend the Mass in discharge of their Sunday obligation before the Event, and either stay inside and continue praying, or go outside to demonstrate. (Excerpt, pp. (J. Burns) 930, 1037, 1044, 1048-50, 1063-65, (M. Burns) 935, 1069, (Kiley) 1169-76, (Cooke) 304, 674, 1107-08.) They did not consider the Event to be a religious service but a party to celebrate Wilson's election. The last thing they expected was to be forcibly removed for praying. (Excerpt, pp. (M. Burns) 554-55, 1073-75, 1081.)

3. Petitioners' Event activities before arrest

The morning of the Event, some of the Petitioners, traveling separately, arrived on time for the Mass, and remained to pray. (Excerpt, pp. (M. Burns) 1070-72, 1076, (J. Burns) 1037, 1040-42, 1048-49, (R. Szabo) 1227, (Kiley) 1177, (Reali) 193, 195, (Scheidler) 1219, (J. Hockel) 1453-65.) Laurette Elsberry picked up Rhomberg and took him to the Cathedral for the Mass. (Excerpt, p. 682.) Upon entering, she observed the Szabos, Paula Burbach, Theresa Reali, Scott Kiley, and Richard Szabo's father inside. (Ibid.) Some arrived too late

for the Mass, but joined those who remained after the Mass to pray. (Excerpt, pp. (Shunk) 938-39, 1221-24, (Cooke) 1108.) One Petitioner changed his mind about going outside, and remained inside to pray. (Excerpt, pp. (Cooke) 1109, 1119.) Some of them decided to go up front, right in front of the altar, after Mass. (Excerpt, pp. 678, (Rhomberg) 1213, (R. Szabo) 1230, (Kiley) 540, (Reali) 1193, 1195.) Elsberry left before the end of the Mass to call and inform Paul Laubacher the Event was proceeding, Catholics were ready to remain and pray, with no indication of removals. This allowed Laubacher to fax the January 6 letter to Wilson and the media. (Excerpt, pp. 682, 689.)

As some of the Catholics were praying, some plainclothes persons approached and requested they move, saying something about citizens' arrests. (Excerpt, p. 545, 679 (Msgr. Kidder).) They did not move. (Excerpt, pp. (R. Szabo) 949, (Reali) 1192-94.) Reali was never approached by Colliau and asked to cease her activities. (Excerpt, pp. (Reali) 226-28, 230, 238, (Bartucco) 342, 348-51.) Bishop Quinn granted Petitioners permission to remain in their pews to pray and refused permission to remove them when requested by the Respondents. (Excerpt, pp. (McGagin) 1187, (Kidder) 485), (Quinn) 506, 508, (Colliau) 439, (Cooper) 522-23, 679.) Instead, Wilson and his guests were moved to another front section. (Excerpt, pp. (Kidder) 868, (Quinn) 506, 508, 680.) Neither the Bishop nor Msgr. Kidder considered Petitioner's activities disruptive. (Excerpt, pp. 485, 679.)

At 10:00 a.m., prelude music was provided to set the mood while people were being seated. While the VIPs and other attendees were entering the Cathedral, greeting each other and conversing, the Petitioners were kneeling in different areas at the front of the Cathedral and individually praying the Holy Rosary. (Excerpt, p. 685.) As the Choir began singing the "Battle Hymn of the Republic", Fr. Carl Steinauer invited the congregation to stand, but P. Wilson motioned for everyone to sit. (Excerpt, pp. 389, 684, 686, 687-88.) Petitioners stood with the Congregation and started praying, and the arrests began. (See post, page 10.)

4. Respondents' Relationship & Activities

The Campaign Committee existed to direct the campaign that resulted in the election of Pete Wilson. The Inaugural Committee was formed for the sole purpose of organizing six events relating to Wilson's inauguration as Governor.[7] (Excerpt, pp. (Committee Exhibit) 1433-52, (Cooper) 1126-27, (Rhomberg) 1433.) White was the CEO of the Inaugural Committee. (Excerpt, p. 713, (Rhomberg) 649-51, 1436.)

P. Wilson, White, and Otto Bos were in charge of the Transition Office and exercised ultimate control over the Inaugural Committee, which took over the Campaign office and furniture. (Excerpt, p. (M. Wilson) 78, 79, 399, 861-62, 1240, 1244, 1246.) Most of the workers from the Campaign Committee went to work for the Transition Office to prepare to take over the government, while others went to the Inaugural Committee. (Excerpt, p. (M. Wilson) 861-62, 1243-44; Excerpt, pp. (McGagin) 101-02, 1185; Excerpt, pp. (Wilson) 1247-48, (Cooper) 1128-29, 1135; Excerpt, pp. (Cooper) 93, 94, 1131-32; Excerpt, pp. (Colliau, 110, 135, 1092-93, 1104.)

Robert White had been Wilson's Chief of Staff since 1963, during a period Wilson held a number of public offices, with a reputation of being Wilson's alter ego, such that speaking to White was the same as speaking to Wilson. (Excerpt, p. 709.) Ultimately, everybody reported to him. (Excerpt, pp. (White, 415-16.)

White appointed (Excerpt, p 671.), and P. Wilson personally approved, Martin Wilson as Director of the Inaugural Committee (Excerpt, pp. 710, (M. Wilson) 77, 78, (McGagin) 1186.) M. Wilson ran the operations assisted by Deputy Director Patricia Clarey, Wilson's Deputy Chief of Staff. (Excerpt, pp. (M. Wilson) 77, 78, 861, 1242 (McGagin) 1186, 692, (Clarey) 1090.) Tom Cooper and Karen McGagin were responsible for the Event and reported directly to Clarey and M. Wilson. (Excerpt, pp. (Cooper) 93-95, (McGagin) 100-01, 105-08, (M. Wilson) 79, 671, 1249-50.)

Lt. Montey Hensley, of the California State Police, was responsible for the security at the Event. (Excerpt, p. 697.)

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[7] Pursuant to Inaugural Committee's Bylaws, Art. VI, § 5, the CEO "Shall have general supervision, direction and control of the business of the corporation." (Excerpt, p. 1439.)

MacDonald and Jerry Everett were involved with threat assessment for all of the events. (Excerpt, pp. 952; Ante, page, 5.) Cooper, McGagin, Hensley, MacDonald, Everett, and Colliau were present at the Cathedral meeting regarding security. (Ante, p. 5; (Excerpt, pp. (MacDonald) 952, (Colliau) 114, (Cooper) 1134 - 35.)

Colliau was volunteer head usher, designated to make citizen's arrests, given additional duties and training by state police, and part of security. (Excerpt, pp. 671, (Colliau) 110, 113, 115, 135, 1094-97, 1102, 1104, (Hensley) 1150-52.)

P. Wilson did not personally attend or participate in any meetings, or discussions on arrests or removals, however, he and White were briefed on security matters, and kept up to date on planning activities. (Excerpt, pp. 702-03, 710.) An Event schedule was sent to Clarey, raising an inference the schedule was prepared in advance, subject to Wilson's control and supervision. Wilson and White were aware of the Church's position on arrests. (Excerpt, p. 692, 710.) White learned of the Anti-Desecration League Letter before arriving at the Cathedral. (Excerpt, p. 701.)

5. The Evidence against P. Wilson, White, et al.

Pete Wilson was present at the Event, with his chief lieutenant, White, only a few feet away. (Excerpt, p. 701.) A number of **witnesses** saw P. Wilson confer with White and Colliau, those around him, to motion to everybody to sit down (Excerpt, pp. (J. Burns) 618-19, 1044, 1047, 1078-80.).

White expressed displeasure with Petitioners to Pennel that was passed on to Hensley. (Excerpt, pp. (Rhomberg) 549, (Video) 567, 658, (P. Wilson) 492, 496, 497, (White) 406, 407, 408-10, 415-16, 1235-38, (**Pennel**) 462 (talks to White), 462 (demonstrators), 463 (removal; P. Wilson present), 464 (wished demonstration could be ended).) Witnesses saw Colliau, apparently in charge, speak with others, and the arrests began evidently on directions of P. Wilson and White. (Excerpt, pp. 560, 690-91, 693-95, 695-97, 701, (J. Burns) 200-01, 1018.), (Rhomberg) 549, (Video: Chan. 10 segment 00:00:32:24 - 00:00:39:28l Chan. 13 segment 00:00:37:00 -

00:00:43:20) 567, (Peters/Perez Report) 965, (Everett report) 991.); p. 1044-47.). **Respondent Pennel corroborated the sequence of events, and what was said.** (Excerpt, pp. 462 (White), 462 (demonstrators), 463 (removal; P. Wilson), 464 (wished demonstration could end), 515 (Pennel's Report).)

6. Evidence against City and Lt. Twilling

Photographs and video show Lt. Twilling inside the Cathedral aiding the removal of R. Szabo, J. Szabo, and Kiley. He is then seen coming from the direction of the South door, just prior to the removal of J. Szabo, less than a minute after Reali was taken out through the South door. (Excerpt, pp. (J. Hockel) 1453-65, (Hensely) 1153-54 (ID of Twilling), (Elsberry) 980, (Rhomberg) 549, (Video) 567.) Another videotape shows Twilling outside the Cathedral watching and smiling as R. Szabo is roughed up by City police officers Chuck Sandoval and Geoffrey Winford. (Excerpt, pp. (Winford) 1251-56, (Twilling) 1233, (Rhomberg) 549, (Video Tape Channel 10 segment, CTL 00:00:42:28-00:00:45:16) 567, (Jensen) 1156.) According to Deputy Chief Fred Arthur, Twilling should involve himself in arrests or removals only if there is violence. Petitioners caused no violence within the Cathedral. (Excerpt, pp. 1484-86.)

With the apparent encouragement of his superiors, Dowden proceeded to threaten and insult Reali in an outrageous manner while she was barely conscious and handcuffed in a manner causing unnecessary pain and injury. (Excerpt, pp. (Baggett) 1026-32 (description of treatment).)

City Police have a custom of ignoring injury complaints of so-called "pro lifers" due to alleged exaggeration of those injuries. They are only transported to the hospital if they are bleeding, had discernible swelling or bruises, or were vomiting. (Excerpt, pp. (Ridge) 1485, (Baggett) 1026-32 (Theresa Reali's treatment).)

All Petitioners, except Reali, were escorted to a paddy wagon and driven to the city police station at 613 6th Street. (Excerpt, pp. (MacDonald) 1180-83.)

7. Arrest of Albin Rhomberg.

As the choir began singing, Mr. Rhomberg stood with the

congregation, while praying the Lord's Prayer, but could not be heard one seat away. (Excerpt, pp. (A. Tisdale) 1476-787.) As he stood, he was approached by Colliau, seen on video, and allegedly informed it was illegal to disrupt a religious service and then something about citizens' arrest. (Excerpt, p. 592, (Rhomberg) 549, (Video) 567.).) Officers Nicholas Perez and David Peters immediately dragged him from his pew. (Excerpt, pp. 593, 1205, (Rhomberg's description) 549, (Video) 567, (Police Report) 991.)

8. Arrest of John Burns.

J. Burns was with his ten-year-old daughter, Colleen. When the choir began signing, J. Burns stood with the congregation, and started reciting the Lord's Prayer with others. (Excerpt, pp. (Kidder) 486, (J. Burns) 619, 1066, (Kiley) 542-43, (Cooper) 1054, (Colliau) 1103, (M. Burns) 1072.) Persons around them during his prayers did not hear them. (Excerpt, pp. (A. Tisdale) 1476-78, (N. Keim) 1159, (M. Burns) 557, 1077.) Sgt. Ostergar approached, grabbed him by the upper arm (Excerpt, pp. (J. Burns) 1062.), and removed him from the Cathedral. (Excerpt, pp. (Ostergar's report) 967.) Ostergar threatened to take J. Burns' daughter if he did not cooperate. (Excerpt, pp. 200-01, 1043.) Outside, he was turned over to City police (Excerpt, p. 1043.), who twisted his arm rather forcefully. (Excerpt, pp. 1067.)

9. Arrest of Michael Burns

Burns was praying when the choir began singing. He stood with the rest of the congregation, continuing his whispered prayer of the rosary, not the Lord's Prayer, to himself. (Excerpt, pp. (M. Burns) 556-56, 936-37, 1083-84.) No one nearby heard him praying. (Excerpt, pp. (Tisdale) 1476-78, (Keim) 1159.) When the arrests started, he knelt down and continued praying the rosary silently, in fear of being "brutalized" too. (Excerpt, pp. 1082-83.) As he silently prayed, Ostergar said, "Come on, why don't you make this easy on us because, you know, if you don't come with us, we'll have to drag you out." (Excerpt, pp. 1082-83.) He was grabbed and removed as he prayed silently. (Excerpt, pp. (Ostergar) 967, (M. Burns) 1084-85, 1087.).

10. The Arrest of J. Szabo

John Szabo, 81 years old, was in frail health, and had undergone heart bypass surgery. (Excerpt, p. 227, 1228.) His voice was gravely and he could not speak very loud because of a throat condition. (Excerpt, p. 1228.) As the choir began singing, his gravely voice could not carry across the aisle. (Excerpt, p 957.) When approached by Bartucco, he was half kneeling/half seated in the far right side of the front pew. He resisted attempts to remove him from the Cathedral. (Excerpt, p. (Reali) 227.) As Bartucco and others removed Reali, Szabo called out, "My daughter, my daughter." (Excerpt, pp. (Burbach) 1035, (Elsberry) 972, 978.) MacDonald was motioned by Sgt. Ostergar, to aid Everett in the removal of J. Szabo, and did so. The arresting officers can be seen on video hustling Mr. Szabo across the front of the Cathedral twisting his arm.

11. Arrest and mistreatment of Theresa Reali

Reali's father was across the aisle, about 5 feet away, in a seated position, and she was on her knees praying the rosary quietly. As Bartucco approached her father to remove him, Reali rose and approached to tell Bartucco about her father's frail health. (Excerpt, 226-27.) Bartucco immediately grabbed her arm and told her she was being taken out. (Excerpt, pp. (Judie Hockel) 1453-65, (Rhomberg's description) 549, (Video) 567.) Two more men surrounded her, turned her in the process, to drag her backwards, past a large pillar directly south of her pew, where they forcibly dropped her, causing her head to strike the floor. Her head immediately felt as if it was splitting, and she suffered severe pain. (Excerpt, pp. (Reali) 1196.) She remembers being dragged to the South door, handcuffed, passed to City police outside, and a flash of bright light, but does not recall how she got to the Board of Corporations (BOC).[8] (Excerpt, pp. (Reali) 1197-98, (Baggett) 1028-29, 1479-83.) Upon arri-

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[8] Reali was taken to the BOC Building by City police officers, David Kidd and Keith Jensen on orders from Sergeant Patrick Dowden, Sacramento City Police, who was in charge of the SWAT team that day. (Baggett, 18:25-28, 19:17-22; Kidd, 13:13-16, 15:14-22; Reali, 74:28-75:10)

val, she was placed in a chair with her hands held behind her back by steel handcuffs, the entire time she was there, with her rosary entangled in her fingers, hands and wrists. At some point she was allowed to put her head down on a table on some magazines. During her detention, she, and Jay Baggett requested medical attention, more than once, which Dowden denied with the observation she was not bleeding and did not need medical attention. (Excerpt, pp. (Reali) 221-22, 1201), (Baggett) 1030, 1479-83.) When Baggett begged, Officer Keith Jensen, radioed "the prisoner is complaining of dizziness". A voice sounding like Dowden's replied, "well, aside from being retarded, what's her problem?" (Excerpt, pp. 1157, (Baggett) 1031, 1479-83.) While being detained, Dowden subjected Reali to: threats; abuse; told her to "shut up" when she moaned from her pain; used obscenities; spoke in a taunting manner about his atheistic and pro abortion views; called her a religious fanatic; and, struck his hand and thigh with his night stick in a threatening manner at her, putting her in extreme fear for her safety. (Excerpt, (Reali) pp. 1200-03, pp. (Baggett) 1032, 1479-83.) During this time, she was in extreme pain, and was not fully conscious all the time. (Excerpt, pp. 1199.) She was held for about one and one half-hour before being transported to the police station. (Excerpt, pp. 1479-83.)

12. The Arrest of Scott Kiley

As the choir began singing, Kiley stood with the congregation, and began reciting the Lord's Prayer. (Excerpt, p. 274.) While standing, citizens' arrest was mentioned so they resumed a kneeling position and the rosary. (Excerpt, p. 279) Without further warning, Kiley was removed by State Officer Bartucco and City Police Lt. Twilling. (Excerpt, pp. (Kiley) 281, 1178, (Judie Hockel) 1453-65, (Rhomberg), 649, (Video) 657.) During the removal, Bartucco twisted Kiley's arm causing very painful injuries. (Excerpt, p. 1179.)

13. The Arrest of Joseph Scheidler

When Msgr. Kidder finished the concluding prayers without a prayer for the Unborn, Scheidler added, "And may Governor-elect Wilson— denounce his pro-abortion

position, which has made this ceremony a sacrilege." (Excerpt, pp. (Scheidler) 563, 946, (Elsberry) 698, 972, 987.) Beth Hockel then handed him a banner reading "Sacrilege" that she had under her coat. (Excerpt, pp. (E. Hockel) 698, 1471-75.) Scheidler was prevented from displaying it because Officers Harder and Ostergar, assisted by Pennel and Elizabeth Jeske, arrested and removed him from the Cathedral. (Excerpt, pp. 705, (Harder) 964, (Ostergar) 968, (Rhomberg), 649, (Video, 2nd segment 03:10:28) 657, (Judie Hockel) 1453-65 w/photos.)[9]

14. The Arrest of Jack Cooke

As Wilson and his wife departed down the center aisle toward the main exit, and were about three feet away, Cooke said spontaneously in a loud voice, "What are you going to do about murdering millions of Unborn children in the state?" (Excerpt, pp. 698, (Cooke) 1124.) Pennel and Officer Harder claim Cooke appeared to lunge at Wilson, then reach out, as if he intended physical contact with Wilson. (Excerpt, pp. 699, 700.) They considered Cooke a threat to Wilson. (Excerpt, p. 699.) Cooke denies lunging, as officers were blocking his way to Wilson. (Excerpt, pp. (Cooke) 583, 1120, (Rhomberg) 549, (Video, Ch. 10) 567.) Jeske and Harder held Cooke until Wilson had passed then arrested, seized and dragged him out of the pew. (Excerpt, pp. 699, (Colliau) 1198-01, (Cooke) 309, 1099-01, (Harder) 964, (Ostergar) 968, (Pennel) 515, (Rhomberg) 549, (Video) 567, (Judie Hockel) 1453-65, w/attachments, 705.)

After being grabbed, he attempted to genuflect to the Blessed Sacrament, a form of religious worship, but was grabbed by the belt and lifted. He was handed over to uniformed officers and placed in a paddy wagon. (Excerpt, pp. 583, (Cooke) 1114-16, 1117-18, 1121-23.) Cooke is identified on television news clips.

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[9] Msgr. Kidder opined Scheidler would not have been removed under Cathedral policies. (Excerpt, p.715.) Others believe it was a prayer. (Excerpt, pp. (Kidder) 1167, (J. Hockel) 1453-65, (Jack Hockel) 1466-70, (E. Hockel) 1471-75, (Cooke) 580-81, 1113, (Elsberry) 972.)

SUMMARY OF ARGUMENTS

1. Recusal was required where, prior to the filing of the lawsuit, the trial judge was an attorney for one Respondent for a significant portion of his legal career, and another Respondent, as U.S. Senator, played an essential and active role in the judge's nomination to the U.S. District Court.

2. Catholics, who believe in the sanctity of human life, do have standing to assert the rights of the Unborn where, in their own Cathedral, they are arrested for praying for their faith, the Unborn, and the repentance of a pro-abortion governor-elect.

3. The Unborn are "persons" in the Constitutional sense by virtue of the term "Posterity," as used in the Preamble of the Constitution of the United States, and therefore entitled to defend their lives, and to be defended by third persons, such as the Petitioners in this case.

4. Penal Code §§ 145 and 302 are repugnant to the 1st Amendment when used to arrest and remove Catholics, believing a pro-abortion governor-elect celebrating his inauguration in their Cathedral is a sacrilege, praying for their faith, and the repentance of the governor-elect, in the absence of violence or threats thereof.

5. There is sufficient evidence raising genuine triable issues of fact that either Pete Wilson, Robert White, or both, deprived Petitioners, or caused Petitioners to be deprived of, federally protected rights in the arrest and removal of Petitioners from a Cathedral by virtue of their personal presence, right of control over other Respondents, and direct evidence they controlled the activities of other Respondents.

6. Good faith does depend on the facts observed in the arrest of Catholics in their Cathedral, rather than on the status of state law or the good faith of another person.

7. The trial court did mislead the jury by following its decision on cross-motions for summary judgment, thus precluding the jury from considering the rights of the Petitioners to be present in the Cathedral to protect their religious beliefs, the rights of the Unborn, and their standing to protect the rights of the Unborn.

ARGUMENT

I.

THE LOWER COURTS DECIDED AN IMPORTANT QUESTION REGARDING RECUSAL NOT DIRECTLY FACED BY THIS COURT, THAT APPEARS TO BE INCONSISTENT WITH PRECEDENT, OR REQUIRES THE SUPERVISORIAL HAND OF THIS COURT

The trial judge came to his present bench in a process that significantly involved Pete Wilson, and worked most of his professional career as a deputy City Attorney for Respondent Sacramento. His last employment with Sacramento was near in time to the events in this case, and about a year prior to the filing in the district court. (Excerpt, pp. 54-60.) A timely motion was made to recuse. The judge denied the motion. (Excerpt, p. 1560.)

The trial court summarily denied the motion to recuse. The Ninth Circuit, relying on Ninth Circuit precedent, ruled that neither Wilson's recommendation, standing alone, nor former employment as [Deputy] City Attorney establish a sufficient basis for questioning impartiality. App., p. 8.

In *Liljeberg v. Health Services Acquisition Corporation*, 486 U.S. 847 (1988), the Court held the statute, reasonably construed, required recusal where a judge's *impartiality might reasonably be questioned*, and recusal was required because the judge had been a member of the Board of one of the parties involved in the litigation.[10] *Accord, Aetna v. Lavoie*, 475 U.S.

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[10] Respondents cited a number of cases that are clearly *distinguishable*. Because executive authority appoints nearly all judges, the rule of necessity does come into play. (C.f., *United States v. Will*, 449 U.S. 200 (1980) (Judge's compensation; qualifications of judge; rule of necessity; someone has to decide) *with Aetna v. Lavoie, supra* (State supreme court; one justice held a policy issued by Aetna; recusal required).) Stated otherwise, if the executive is a party to a lawsuit, but there is no judge available the executive did not appoint, then the rule allows that some judge shall have to decide the case, notwithstanding. In each of the following recusal was **not required** because the executive, or **appointing authority**, was **not a party**: *Hirschkop v. Virginia State Bar*, 406 F. Supp. (N.D. Va. 1975); *Venuto v. Witco Co.*, 808 F.Supp. 387 (D.N.J. 1992). In the following, recusal **not required** in criminal case merely because the **judge was an ex-prosecutor**: *United States v. DeLuna*, 763 F.2d 897, 907-08 (8th Cir. 1985); *Jenkins v. Bordenkircher*, 611 F.2d 162, 165-67 (6th Cir. 1979). In the fol-

813 (1986) (Held an Aetna policy.)

In this case, the sitting judge had a substantial relationship with one of the Respondents within 2 years of the incident giving rise to this action, and sits by virtue of an appointment initiated by another Respondent. All of this raises serious and important questions regarding the administration of justice, and presents an opportunity to clarify under what circumstances a judge ought to be recused.

II.

THE LOWER COURTS DECIDED IMPORTANT QUESTIONS OF LAW REGARDING STANDING, PETITIONERS' RIGHTS, AND THOSE OF THE UNBORN, PART OF A CONTINUING PUBLIC CONTROVERSY, INCONSISTENTLY WITH PRECEDENT, AND BECAUSE PETITIONERS CAN POINT TO EXPRESS WORDS THAT INCLUDE THE UNBORN AS CONSTITUTIONAL PERSONS, THIS COURT OUGHT CONSIDER AND RESOLVE THESE IMPORTANT ISSUES AT THIS TIME

A. THE STANDARD FOR SUMMARY JUDGMENT

A reviewing court is not limited to the law cited in the Trial court, but in fact must consider all applicable law *de novo*. *Elder v. Holloway*, 114 S.Ct. 1019 (1994). A court will not grant a motion for summary judgment if, after viewing the evidence in the light most favorable to the party opposing the motion, the court finds a genuine issue of material fact and determines that the moving party is not entitled to judgment as a matter of law. *Matsushita Elec. Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574, 552-53 (1986). If the nonmoving party produces direct evidence contradicting direct

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lowing, recusal was **not required** for **failure to show extra-judicial conduct**: *Ainsworth v. Combined Ins. Co. of America*, 774 P.2d 1003 (Nev. 1989); *Liteky v. United States*, 510 U.S. 540 (1994).) In the following **recusal was required**: *Taylor v. Hayes*, 418 U.S. 488 (1974) (judge had been the object of newspaper's wrath; bias existed); *Home Placement Service, Inc. v. Providence Journal Co.*, 739 F.2d 671 (1984). In the following, there was no challenge for bias, and the rule of necessity may have been applicable, intergovernmental litigation: *Wilson v. Eu*, 1 Cal.4th 707 (1992); *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993).

evidence, the court must assume the truth of the evidence as to that fact. *Tirona v. State Farm Mut. Auto Ins. Co.*, 812 F.Supp. 1083, 1085 (HI 1993), *citing T.W. Electrical Services, Inc. v. Pacific Electrical Contractors, Ass'n*, 809 F.2d 629 (9th Cir. 1987). The court must resolve all reasonable inferences in favor of the non-moving party, and if the opposing party has available witnesses and evidence that demonstrates more than some metaphysical doubt as to the material facts, evidence of a genuine triable issue of fact, it must deny the motion. *Matsushita Elec. Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574, 552-53 (1986).

As to standing, Petitioners' rights in their Cathedral, and the Unborn, the lower courts appear to have decided important issues that, in part, depart from precedent of this Court, and as to the Unborn, in a manner that departs from the direction this court has been taking, justifying review of an extraordinary event that constitutes but a thread in the fabric of events that has torn the nation asunder, to clarify the rights of "Ourselves and our Posterity."

B. THE LOWER COURTS DECISION ON STANDING IS INCONSISTENT WITH PRECEDENT IN THIS COURT

The Ninth Circuit ruled Petitioners lacked standing to challenge the state statute because they have "failed to demonstrate a credible threat of immediate future harm," *citing, inter alia, Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983), and as to protect the Unborn because "ordinarily, one may not claim standing . . . . . to vindicate the constitutional rights of some third party," *citing Barrows v. Jackson*, 346 U.S. 249, 255 (1953). App., p. 3.

This Court has held that where fundamental rights are implicated, third party standing will be permitted to vindicate the rights of parties not before the court, if there is sufficient adversariness to protect the integrity of the adversary process and the issues are of sufficient concrete facts to avoid advisory opinions. (*E.g., Craig v. Boren*, 429 U.S. 190, 192-93. (1976).) *Craig* involved a challenge to a State statute regulating sales of alcoholic beverages by a male who turned 21 during the suit and a vendor of alcoholic beverages. Pur-

portedly exercising its powers under the 22nd Amendment, the State set the legal drinking age for females at age 18 and for males at age 21. The male was dismissed as moot because he no longer would be affected by the State regulation. However, the court noted the vendor was still affected by the restriction, and moreover, while a class action by 18 year olds was maintainable, it was equally maintainable by the vendor and practical to do so because the vendor was directly affected.

By far, the easiest case for standing is that for the Unborn. Because they are Unborn, obviously they cannot protect their own rights in the courts. Other than 5 *amicus curiae* cases,[11] there is not a single case in this Court addressing whether the Unborn are protected by the Preamble, and the term 'posterity.' This court has historically permitted standing to vindicate rights of those not before the court, those who might themselves be unable to vindicate their own rights, such as the Unborn.

The second case for standing, whether §§ 145 or 302, either facially, or as applied in this case, can, consistently with First Amendment values, permit a peace officer to exercise a religious opinion as to what constitutes a proper prayer, or is disruptive, is one of first blush, but in the context of a continuing controversy over abortion, and the continuing turmoil in the streets, to claim that petitioners can show no future possibility of a problem is disingenuous at best, and ignores important social and emotional turmoil that has no signs of abating. See Post, p. 26.

Finally, respondents were relying for their good faith belief on §§ 145 and 302 in this controversy. If Respondents have standing to claim the protection of §§ 145 and 302, then Petitioners should have reciprocal standing to show its invalidity, and the lack of a basis for a good faith belief in its validity. *E.g., Tennessee v. Garner*, 471 U.S. 1 (1985) (Fleeing felon statute unconstitutional; officer limited to good faith).

It is clear that as to the issue of standing, the court's decision conflicts with this Court's precedent requiring review

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[11] See, Lynch, op. cit. 40 AJJ 401,fn. 1.

by this Court to consider this important question.

C. WHETHER THE UNBORN ARE MEMBERS OF 'POSTERITY' IN THE PREAMBLE IS AN IMPORTANT ISSUE THIS COURT HAS NOT HAD THE OPPORTUNITY TO FACE DIRECTLY, AND DECIDED BELOW IN A MANNER INCONSISTENT WITH THE DIRECTION THIS COURT HAS BEEN TAKING

The Courts below did not reach the merits of whether the Unborn are members of Posterity, deciding Petitioners lacked standing. App., p. 4. *Roe v. Wade*, 410 U.S. 113 (1973),[12] *held* as it did because Texas failed to show text in the Constitution inclusive of the Unborn. (Id, at 157-59.)

Statutes or practices inconsistent[13] with the Constitution, however numerous, can create neither a power which the Constitution does not bestow nor furnish a construction[14]

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[12] The Petition, Response, and Briefs by the parties and *amicus* in *Roe v. Wade*, shows the arguments focused on the term 'person' as used in the 5th and 14th Amendments of the Constitution. (75 Landmark Briefs and Arguments of the Supreme Court of the United States.)

[13] This Court, with characteristic good grace, has invalidated its own Rules of Court, in part, based on a Congressional Statute requiring attorneys to take an oath with respect to activities before the Civil War, when it was pointed out that the provision was unconstitutional. *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1867). Faced with the Constitutionality of "separate but equal" facilities, a practice in existence for nearly 60 years, and sanctioned by this Court, this Court *overruled*, and rightfully so, *Plessy v. Ferguson*, 163 U.S. 537 (1896) in *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*); *accord, Bolling v. Sharpe*, 347 U.S. 497 (1954). Moreover, where the importance of the question is great, and touches sensitive issues in need of resolution once and for all, this court has not allowed the fact that some issues were not properly addressed in the courts below from ordering argument on the omitted issues to settle the continuing controversy. *Brown I*, 347 U.S., at 488-89, 496; *Brown v. Board of Ed.*, 349 U.S. 294, 298 (1955) (*Brown II*) (Nature of remedy).

[14] The same rule of interpretation, and sources of judicial information, may be resorted to as in the construction of statutes and other instruments granting power. *Adams v. Storey*, 1 Paine (U.S.) 79, 1 Fed. Cas. page 141, 145 (1817). The constitution and the law are to be expounded without leaning one way or the other, according to those general principles that usually govern the construction of fundamental or other laws. *Bank of the United States v. Deveaux*, 5 Cranch (9 U.S.) 61, 85, 3 L.Ed. 38 (1809). No word or clause can be rejected as superfluous or unmeaning, but each must be given its due force and appropriate meaning. *Wright v. United States*, 302 U.S. 583, 588 (1938); *Knowlton v. Moore*, 178 U.S. 87 (1900). Words and terms are to be taken in the sense they were used and understood at common law and at the time the constitution and the amendment were adopted. *Veazie Bank v. Fenno*, 8 Wall (75 U.S.) 533, 542 (1869); *Locke v. New Orleans*, 4 Wall (71 U.S.) 172 (1866); *Gibbons v. Ogden*, 9

which the Constitution does not warrant. (*Field v. Clark*, 143 U.S. 649, 691 (1891); 3 Rotunda, TREATISE ON CONSTITUTIONAL LAW § 23.33, p. 512 (1986).) This court can judicially notice the impact of the abortion cases on society. Similarly, it is common news that throughout the country, the abortion controversy has led to disorder in the streets.[15] Moreover, the *Roe Decision* "has proved "unsound in principal, and unworkable in practice." *Webster v. Reproductive Health Services*, 492 U.S. 490, 518 (1989).

Roe does not address the term "Posterity" in the Preamble.[16] This Court has used the term "posterity" on one prior occasion (*United States v. Cruikshank*, 92 U.S. (2 Otto) 542 (1876).), but has defined the term, and its meaning. This Court has held consenting adults cannot use the right of privacy in their own bedroom to engage in homosexual conduct forbidden by State Law. (*Bowers v. Hardwick*, 478 U.S. 186 (1986).) No case has ever reported a female, based on her right to privacy, can do whatever she wishes with her body, including acts of prostitution in the privacy of her own bedroom in violation of state law. *A fortiori*, if the fetus is a person in the Constitutional sense, it does not seem reasonably possible that a woman can, absent justification or excuse, take the life of a fetus in violation of valid state law. This Court observed in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) that statutes which withheld public funds, employees, and facilities from use in non-therapeutic abortions did not offend the Constitution. In doing so, the decision all but wiped *Roe* off the books as an unconditional right to abortion. *Id*, (Scalia, J., concurring).

Weat. (22 U.S.) 1, 188-189, 6 L.Ed. 23 (1824); *United States v. Harris*, 1 Abb. (U.S.) 110, 26 Fed. Ca. No. 15, 312 (1866); *United States v. Block*, 4 Sawy. (U.S.) 211, 24 Fed.Cas. 14,609 (1877); Pardoning Power of the President, 5 Opinion U.S. Atty. Gen. 532, 535 (1852). Where there are several possible meanings of the words of the constitution, that meaning which will defeat rather than effectuate the constitutional purpose cannot rightly be preferred. *United States v. Classic*, 313 U.S. 299, 316 (1941).

[15] It is not suggested disorder is the reason for *overruling Roe*. Quite the contrary, it is because the Unborn are constitutional persons by virtue of the term Posterity found in the Preamble. The notation is but recognition of a need to resolve, if it can be, the problem.

[16] See, appendix, p. A9.

An analysis of the Preamble[17] itself inexorably leads to the conclusion this Court was misled, because the Unborn are members of "posterity," therefore persons in the Constitutional sense. Moreover, *Roe* is "unsound in principal and unworkable in practice" because it leaves those who would obey the law guessing as to when a Constitutional person is present. *Webster, supra*, 492 U.S. at 518-519; Lynch, POSTERITY: A CONSTITUTIONAL PEG FOR THE UNBORN, 40 American Journal of Jurisprudence 401 (1995).

The above arguments accommodate the needs of women who, for compelling reasons should terminate a pregnancy, the needs of other interested persons, and the constitutional mandate for respect of life, with adequate safe guards against governmental intrusion in what ought to be a private matter. Given the historical debate, anguish of a nation torn asunder, and impact on this court's docket, the court is presented with its first opportunity to review an argument presented in five prior cases by *amicus curiae*, but not raised by the parties in the courts below. The course chartered by this court, evidencing a retreat from *Roe v. Wade*, indicate a more definitive statement as to the rights of the mother, the Unborn, and other interested persons, is needed such that

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[17] "Neither the 5th nor the 14th Amendment defines person. The 14th Amendment defines citizenship. App. p. A10. In other contexts, the court has held that aliens and non-natural persons are persons entitled to Constitutional protection. Not to recognize the Unborn as a person is therefore an anomaly. As "Person" is used without qualification, the most logical place to look for meaning is the Preamble because, while its purpose is not to create right, it does define for whom the rights were created. The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. The Preamble creates two classes of sovereignty: "ourselves" and "our Posterity." Its purpose appears to be to include "Posterity" on an equal footing with, and the same rights as, "ourselves" as evidenced by the parallel structure of the phrase. Therefore, "Posterity," as to those who are lives in being, is synonymous, if not with "citizen," surely with "person." This understanding is consistent with the meaning of posterity in 1776. In 1644, it was argued that "Parliament could no more censure the issue of the mind than it could the issue of the womb." At common law, certain members of future generations, fetuses, were lives in being for the purposes of the Rule Against Perpetuities. Moreover, prenatal injuries were, to a limited extent, recognized at Common Law, and it does not appear that tort actions for the injuries were barred. and "a perpetual union," for the protection of future generations, including the Unborn. [Cites omitted.]" Lynch, op. Cit., 40 AJJ, at 401-02.

the court should grant review of this important issue.

D. THE LOWER COURTS' DECISION ON PETITIONERS' RIGHT TO PRAY IN THE CATHEDRAL IS AN IMPORTANT ISSUE *DE NOVO*, AND INCONSISTENT WITH PRECEDENT.

There is no known reported case where persons of faith were arrested in their own church for praying. The Trial court granted summary judgment against petitioners on the issue finding that prayers could be disruptive. The Ninth Circuit failed, or refused, to address the issue dismissing petitioner's claims with, "When [the peace officers] accepted custody of appellants it was objectively reasonable for [them] to believe that the appellants had been lawfully arrested for disrupting a religious service." App., p. A5.

First of all, the Petitioners were clearly Catholics with a right to be in the Cathedral with the express permission of the Bishop and Msgr. Kidder. Ante, p. 7. Respondents, on the other hand, were guests and when they sought the use of the "reserved seats," the Bishop and Msgr. Kidder ordered them moved to another section. Ante, p. 7.

Secondly, the conduct of the Petitioners was not so egregious as claimed by Respondents. Indeed, the record shows that while opposed to abortion, they conducted themselves in a most peaceful manner. Ante, p. 7. Five cases from this Court illustrate why Petitioners could not be arrested.

In *Pierson v. Ray*, 386 U.S. 547 (1967), Afro-American ministers announced an intention to use a "whites only" restroom in a bus terminal. Police stated arrests would follow if they made the attempt. The Ministers, citing desegregation opinions, made the attempt, were arrested, arraigned, found guilty. The Ministers sued under 42 U.S.C., § 1983. This Court found the judge absolutely immune, limiting the arresting officers to a good faith belief based on the ministers' asserting rights of which they had notice.

In *Edwards v. South Carolina*, 372 U.S. 229 (1963), the court refused to recognize that singing of religious and patriotic songs on the capital steps by civil rights African-American teenagers amounted to "fighting words," or apply the "hostile audience doctrine," even with a finding by state courts

of a restive white crowd.[18] *Accord, Cantwell v. Connecticut, supra,* 310 U.S. 296 (religious speech exempt from control). In this case the prayers are in a Cathedral, with no restive crowd. The only violence was the arrests themselves.

In *Bond v. Floyd,* 385 U.S. 116 (1966), Julian Bond was elected to Georgia State Legislature, but his qualifications were challenged because of his opposition to the Viet Nam war and the operation of the draft laws. At a hearing, he testified he sympathized with those who burned their draft cards, but he never had, had never advocated anyone should, and would be willing and able to take, and abide by, the required oath. The House refused to administer the oath or seat him. This Court found the refusal denied Bond his First Amendment Right to free expression because (1) there was no showing Bond could not take the oath with sincerity and (2) such action could, and would, lead to the stifling of minority views. 385 U.S., at 118-24. In this case, that appears to have been the precise reason for the ouster of the Petitioners— their views on abortion.

In the *per curiam* decision of *Watts v. United States,* 394 U.S. 705 (1969), the court reversed appellant's conviction for violating a statute prohibiting persons from "Knowingly and willfully . . . threatening to take the life or to inflict bodily harm upon the President." In a public rally, Watts indicated that if drafted, "the first man I want to get in my sights is L.B.J." The statute was upheld as necessary for the protection of the president, but must "be interpreted with ... the First Amendment clearly in mind. What is a threat must be clearly distinguished from what is . . . protected speech." The court found Watts' remarks were political hyperbole, not a threat, and that the nation was committed to unrestrained expression and debate, including criticism of the government and government officials. 394 U.S., at 706-708. In this case, clearly there were no threats. Exhortations that Wilson not go to the Cathedral— surely; Prayers— certainly; requests he change his views— most certainly; threats of

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[18] They were protesting denial of educational facilities available to white teenagers, and access to other facilities. Here, Petitioners are protesting use of facilities for what they feel was an improper purpose.

violence – none whatsoever.

Finally, in the *per curiam* case of *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the court was faced with an appellant charged with, and convicted of, advocating political reform through violence and assembling with a group advocating criminal syndicalism. The case was based on news film of a Klan rally wherein Klan members, including Brandenburg, discussed a march on Washington, D.C. In reversing, the court held that **advocacy of violence was protected** by the First Amendment **so long as the advocacy did not incite to imminent action,** the key being "incitement."

The prayers could not possibly have incited violence. Scheidler's and Cooke's words were directed towards ending violence. If Petitioners' prayers are advocacy, the advocacy was to end violence directed at the Unborn, not for more violence. The most odious word, abortion, was used in a prayer omitted by Msgr. Kidder, at the end, to end violence towards the Unborn. Objectively, there was nothing amounting to a crime. Petitioners had no subjective intent to incite violence, only to pray. Ante, Statement of Facts. Based on the foregoing, it does not seem reasonably possible that prayers, could be a crime, therefore a reasonable officer would not find probable cause.[19] Thus is presented an important question this court should review at this time.

E. CALIFORNIA PENAL CODE §§ 145 AND 302 WERE APPLIED INCONSISTENTLY WITH PRECEDENT IN THIS COURT

All respondents base the propriety of their conduct upon the application of §§ 145 or 302 of the California Penal Code. App., p. 11. The trial court held that the officers were entitled to rely on the statute, and the Ninth Circuit held that

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[19] Assuming a "place of worship" is *sui generis*, entitled to special protection to prevent religious persecution, the fact is on January 6, 1991, the Cathedral was not being used for a "church function," but a public Event. Whatever the gloss, respondents and the Church had opened the doors of the Cathedral to public controversy when a pro-abortion governor-elect was invited into a pro-life institution. Petitioners had a right to be there to pray. Petitioners could be arrested, if at all, only if they in fact committed an act, other than praying, amounting to a crime. (*Prune Yard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Board of Airport Com'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) [ban unconstitutional even if a non-public forum; no governmental interest would justify absolute].)

Petitioners lacked standing. App., p. 3.

Based on *Garner*, the courts should have found the existence of those sections irrelevant, because respondents should defend based on what they observed at the scene. Moreover, based on 1st Amendment concerns, Petitioners themselves suffered injury in fact, and because respondents' defense was grounded in, and manifested future reliance on the statute, the court should have found standing based on *Houston v. Hill*, 482 U.S. 451 (1987) [Ordinance making it a crime to "interrupt any policeman"; *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) that "[T]he vagueness ... which would result in giving [peace officers] the power to decide in the first instance whether a given activity is [appropriate to a religious service] present[ed] serious constitutional difficulty." *E.g., Board of Airport Com'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), *citing Lewis v. New Orleans*, 415 U.S. 130, 135-136 (1974).

This court should grant review to resolve this issue.

III.

THE LOWER COURTS APPLIED PRINCIPLES OF § 1983 DEFENSES INCONSISTENTLY WITH PRECEDENT

Notwithstanding the absence of an express defense in 42 U.S.C., § 1983, this Court has historically found implied defenses, such as a qualified good faith defense.[20] However, there is no derivative defense, i.e. immunity is personal[21] to the holder, and cannot be asserted by another.

Whether an officer acted in good faith upon a statute is not relevant. *Generally, Anderson v. Creighton*, 483 U.S. 635 (1987); *Tennessee v. Garner*, 471 U.S. 1, (1985) (Fleeing felon statute declared unconstitutional; office limited to good faith

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[20] *Wood v. Strickland*, 420 U.S. 308 (1974); *Procunier v. Navarett*, 434 U.S. 555; *Carlson v. Green*, 446 U.S. 14 (1980).

[21] *Tenney v. Brandhove*, 341 U.S. 367 (1951) (Legislative aid cannot rely on immunity of legislator); *Pierson v. Ray*, 386 U.S. 547 (1967) (officers cannot rely on immunity of judge); *Dennis v. Sparks*, 449 U.S. 24 (1980) (individuals cannot rely on immunity of judge); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (cabinet members cannot assert presidential immunity); *Owens v. Independence*, 445 U.S. 622 (1978) (Municipality cannot rely on qualified immunity of employees).

belief); *Pierson v. Ray*, 386 U.S. 547 (1967). A Respondent must defend, if at all, based on the facts presented at the time Respondent acted. *Garner*; see also, *Pierson v. Ray*, 386 U.S. 547 (1967)(minister's rights; notice; officers had notice).

In this case, neither the status of §§ 145 and 302, nor the good faith of Colliau, and those who aided and abetted, should have been relevant, but only what they observed, on whether probable cause existed to arrest. Because of this important question, this Court should grant review.

IV.

THERE WERE GENUINE TRIABLE ISSUES OF MATERIAL FACTS PRECLUDING A GRANT OF RESPONDENTS' MOTIONS

A. WILSON, CHIEF OF STAFF WHITE, & THE COMMITTEES.

The Ninth Circuit held that Petitioners presented no evidence that either Wilson, or his Chief of Staff White caused the arrests. App., p. A2. This is at odds with the record below, with corroborating evidence of Respondent Pennel's deposition. Ante, p. 10.

Both, if they did not directly start the arrests, surely made statements reasonably understood to start the arrests, and by their presence in a position to halt the arrests. Based on Scheuer, the motion should have been denied. This court should grant review to resolve the issue.

Governors of a state are subject to *Bivens-1983* suits; hence it would appear that a governor-elect would similarly be subject to suit. *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *C.f., Will v. Michigan Department of State Police*, 491 U.S. 58 (1989) (11th Amendment; § 1983 inapplicable to States absent clear Congressional intentions) *with Hafner v. Melo*, 502 U.S. 21, 25-31 (1991) (State officers m ay be held liable in individual capacity); *Soldal v. Cook County*, 506 U.S. 56 (1992).

Where an entity does an act by virtue of a policy maker, and surely Wilson and White were policy makers, then the entity should be liable. *E.g., Oklahoma v. Tuttle*, 471 U.S. 808 (1985) *with Pembaur v. Cincinnati*, 475 U.S. 469 (1986); *Canton v. Harris*, 489 U.S. 378 (1989).

Based on *Tennessee v. Garner*, 471 U.S. 1 (1985), Respondents could not rely on state law, but the facts, and *Soldal v. Cook County*, 506 U.S. 56 (1992), use and abuse of police power to achieve what they could not do as a private person, the courts should have found a triable issue of fact. It takes this court to resolve this important issue.

B. ALL PEACE OFFICERS

Referring to these officers as "The Custody Officers" (Excerpt, p. 1280.), the Court, in effect, held these officers were entitled to immunity because § 302 had not been held unconstitutional. (Excerpt, p. 1282.) The order conflicts with *Tennessee v. Garner*, 471 U.S. 1, (1985) , a statute is not relevant, and precedent that the good faith of others is not relevant, [22] because the issue of good faith is a matter for the jury to decide based on the facts confronting the actor. (Ante, p. 26.) The decision is clearly at odds with this Court's precedent requiring review.

C. CITY OF SACRAMENTO, TWILLING, & DOWDEN

The Ninth Circuit mischaracterized the briefs presented to it. App., p. A6-7. The evidence shows Lt. Twilling was inside the church at the time arrests were made, participated in some arrests, and as a senior officer, he made a policy decision in arresting and accepting detainees, such that not only he, but City, should have been required to stand trial.

Petitioners also had overwhelming evidence that City was aware that Dowden was a loose cannon on the presentation of the spoliation doctrine, and direct evidence of other bad conduct. (Excerpt, p. 1004-21.) Moreover, there was direct evidence a policy maker, Twilling, approved or otherwise ratified Dowden's conduct at the scene. Ante, p. 10.

Because the decision conflicts with precedent from this court, this Court should grant review.

V.

THE PRETRIAL RULINGS PREJUDICED PETITIONERS AT JURY TRIAL

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[22] See, text and footnote at page 26, ante.

The Ninth Circuit held there was no objection. [23] Petitioners attempted to change the court's mind, in satisfaction of Rule 51, but were met with an adamant court. (Excerpt, pp. 1503-04, 1507-08.)

Where a jury is misdirected with an instruction that permits the jury to consider protected speech as a crime, reversal is automatic. (*Henry v. Collins*, 380 U.S. 356, 357-58 (1965) (Per curiam). A misinterpretation of the law is prejudicial where the misinterpretation either allows evidence to go to the jury, or precludes the jury from consideration of the appropriate standard. (*Continental Ore Co. v. Union Carbide & Caron Corp.*, 370 U.S. 690.)

Based on the summary judgment motion, the court denied Petitioners an opportunity to go into prior bad acts of Dowden, including the use of a baseball bat. Yet it allowed Respondent to claim there were no prior bad acts. (Excerpt, p. 1516A, 1516B.) That was prejudicial to Reali.

In shaping the case through the motions for summary judgment, and final pre-trial order, the court so shaped the case it allowed the jury to consider the Petitioners' speech a crime furnishing probable cause for the arrests. It then compounded the error by allowing the jury to focus on whether Respondents acted in good faith reliance on § 302. Thus, is presented an important issue which should be reviewed by this court

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[23] On Rule 56 motions, the court uses the "genuine issue" test, whereas on Rule 50 motions, the court uses "reasonable jury" rule, both of which are very close, with most courts treating them the same. The sole difference between a Rule 50 and Rule 56 motion is procedural; Rule 56 occurs before trial and is based on documents whereas Rule 50 occurs after the evidence has been submitted to the jury. *Generally, Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 744-45, fn. 11. In either event, the Court must advise the parties of the substantive law and rules of evidence it is applying to reach its result in Rule 56 cases (*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).), and when submitting the case to the jury. (FRCP, R. 51.) The failure to make a timely objection may be disregarded if the party's position was previously made clear to the court and further objection would be unavailing. (33 Fed. Proc., L.Ed., Trial § 77:280 (1995), *citing, inter alia, Brown v. Avemco*, 603 F.2d 1367 (9th Cir. 1979).) Here Petitioners lost on the motions for summary judgment and reconsideration. Any defect before the trial judge at the closing stages should have been ignored, because the judge made it clear he would not change his mind.

CONCLUSION

WHEREFORE, for all, or any one of, the foregoing reasons, this court should grant the writ of *certiorari* to the Ninth Circuit, and summarily reverse and remand, or set the matter for briefing, argument, and such other and further relief as the court deems just under the circumstances.

Dated: May 16, 1997

RESPECTFULLY SUBMITTED,

JAMES JOSEPH LYNCH, JR.
ATTORNEY AT LAW
P.O. BOX 336
SACRAMENTO, CA 95812-0336
(916) 448-7871
ATTORNEY FOR PETITIONERS

APPENDIX

MEMORANDUM, 2/18/97, Ninth Circuit

FILED
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CATHY A. CATTERSON,
CLERK
U.S. COURT OF APPEALS

United States Court Of Appeals
For The Ninth Circuit

ALBIN RHOMBERG,
v.
PETE WILSON, etc., et al.,

No. 95-16244
[DC CV-92-20 GEB (JFM)]
MEMORANDUM*

JOHN BURNS, et al.,
v.
PETE WILSON, etc. et al.,

No. 95-16257
[DC CV-92-20 GEB (JFM)]

[-1-]

Appeal from the United States District Court
For the Eastern District of California
Garland E. Burrell, Jr., District Judge, Presiding
Argued and Submitted October 3, 1996
San Francisco, California

Before: SKOPIL and FLETCHER, Circuit Judges, and SMITH,** District Judge

Appellants, abortion protesters, were arrested at the Cathedral of the Blessed Sacrament in Sacramento, California during an ecumenical prayer service that was part of the inauguration of Pete Wilson to his first term as governor. Appellants brought this action under 42 U.S.C. § 1983, together with several pendent state tort claims, against Governor Pete Wilson, various members of his campaign staff, his inaugural and campaign committees and their individual volunteers and members, California state police officers, Sacramento city police officers and the City of Sacramento, alleging violation of their First

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except as provided by 9th Cir. R. 36-3.

** Honorable Fern M. Smith, United States District Judge for the Northern District of California, sitting by designation

Amendment right to speak and their Fourth Amendment right to be free of unreasonable seizure. They also sued California Attorney General Daniel E. Lungren and California Chief of Police Duane Lowe to enjoin the enforcement of and to declare unconstitutional Cal. Penal Code Ann. § 302, which prohibits the disruption of a religious service. All of the Defendants moved for summary judgment asserting qualified immunity, lack of either municipal or supervisorial liability, or lack of standing. The district court granted summary judgment to all defendants except for state police officers Bartucco and Ostergar, Campaign Committee volunteer Russell Colliau, and City police officer Dowden. After a nine-day trial, a jury returned a verdict in favor of these defendants. Appellants appeal the grants of summary judgment, and contend that at trial there was reversible error as a result of erroneous jury instructions. They also appeal the denial of their motion to recuse the district court judge. We have jurisdiction under 28 U.S.C., § 1291 and affirm.

I. Summary Judgment

We review de novo the district court's grant of summary judgment to certain of the defendants. *Bagdadi v. Nazar*, 84 F. 3d 1194, 1197 (9th Cir. 1996). We affirm.

A. GOVERNOR WILSON AND ROBERT WHITE:

Appellants presented no evidence that Governor Wilson or Robert White caused the arrests at issue or participated in making them. *See Monell v. New York City Dept. of Social Services*, 436

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U.S. 658, 691-695 (1978) (rejecting respondeat superior liability) for § 1983 claims); *Johnson v. Duffy*, 588 F. 2d 740, 743 (9th Cir. 1978) (a person subjects another to the deprivation of a constitutional right if he does an affirmative act or participates in another's affirmative act).

B. DANIEL LUNGREN AND DUANE LOWE:

Appellants seek to enjoin enforcement of and to declare unconstitutional Cal. Penal Codes 302, which makes the

willful disturbance of a religious service a misdemeanor. Cal. Penal Code Ann. § 302 (West 1988).[1] Appellants lack standing. Appellants, who are seeking prospective injunctive relief in a civil action against these defendants, failed to demonstrate a credible threat of immediate future harm. *See, Smith v. City of Fontana*, 818 F.2d 1411, 1422 (9th Cir.), cert. denied, 484 U.S. 935 (1987). They have not suffered criminal conviction, do not face pending prosecution under the act and they have not alleged that they are likely to engage in future conduct which would violate § 302. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (denying standing for injunctive relief to victim of police chokehold because he could not demonstrate a real and immediate threat that he would again be stopped for a traffic offense and illegally choked into

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unconsciousness). Past unlawful conduct may be probative on the concreteness of a concern for future prosecution for such conduct, but it does not in itself show a present case or controversy that would warrant injunctive relief. See id., at 106.

Appellants also claim third-party standing to vindicate the rights of the Unborn. Even if we conceded for the purpose of argument that the Unborn were third-parties for purposes of this lawsuit, appellants offer no evidence or reasoning as to why their claim should cause us to depart from the U.S. Supreme Court's general rule that: "Ordinarily, one may not claim standing . . . to vindicate the constitutional rights of some third party." *Barrows v. Jackson*, 346 U.S. 249, 255 (1953). Summary judgment dismissing claims against these defendants was proper.

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[1] Cal. Penal Code § 302: "Every person who willfully disturbs or disquiets any assemblage of people met for religious worship, by profane discourse, rude or indecent behavior, or by any unnecessary noise, either within the place where such meeting is held, or so near it as to disturb the order and solemnity of the meeting, is guilty of a misdemeanor."

C. THE COMMITTEE DEFENDANTS:

Appellants presented no evidence that Martin Wilson, Director of the Pete Wilson for Governor Campaign Committee, or Tom Cooper, a committee volunteer, participated in any way in the arrests at the Cathedral. Summary judgment was therefore properly granted as to them. *See Hansen v. Black*, 855 F.2d 642, 646 (9th Cir. 1989) (supervisory liability requires personal involvement in the constitutional deprivation or a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation).

Appellants argued that the Campaign Committee was liable for the alleged wrongdoing of the Inaugural Committee. They failed, however, to offer any evidence indicating that an alter-ego

relationship existed between the Campaign Committee and the Inaugural Committee. In order to establish alter ego liability, appellants must establish: 1) control of one entity by another, 2) that one entity is the mere conduit of the business of the other, and 3) recognition of a separate existence would occasion fraud and injustice. *See Calvert v. Huckins*, 875 F. Supp. 674, 678 (E.D. Cal. 1991); *Marr v. Postal Union Life Ins. Co.*, 105 P.2d 649, 654 (Cal. Ct. App. 1940). Appellants failed to establish that such a relationship existed between the committees. Further, the claims against the Inaugural Committee were derivative of the claims made against committee volunteer Colliau, who was found by the jury not to have violated any constitutional rights in his citizen's arrest of appellants. Therefore, appellants suffered no constitutional injury and dismissal as to these defendants was proper.

D. STATE POLICE/CUSTODY OFFICERS:

California State Police Officers Everett, MacDonald, Pennel, Perez, and Peters ("Custody Officers"), who accepted custody of appellants after they had been placed under citizen's arrest, were properly granted qualified immunity because they relied upon clearly established law and could have believed as reasonable officers that their conduct was

lawful. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987); *Act UP!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993). When they accepted custody of appellants it was objectively reasonable for the Custody Officers to believe that the appellants had been lawfully arrested for disrupting a religious service.

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An officer who acts in reliance upon a duly-enacted statute or ordinance is ordinarily entitled to qualified immunity. *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994). *C.f., Chew v. Gates*, 27 F.3d 1432, 1447-49 (9th Cir. 1994), *cert.* denied, ___ U.S. ___, 115 S. Ct. 1097 (1995) (holding, in part, that officers implementing a long-established policy are entitled to qualified immunity where no then-existing case law demonstrated that the particular policy was unconstitutional). Where a statute authorizes official conduct that is patently violative of fundamental constitutional principles, an officer who enforces that statute is not entitled to qualified immunity. *Grossman*, 33 F.3d at 1209. That is not the case here. At the time of these arrests, § 302 had been upheld as constitutional by California appellate courts. *People v. Cruz*, 101 Cal. Rptr. 711, 717-718 (Cal. App. Dep't Super. Ct. 1972). There was no contrary authority. We conclude that it was objectively reasonable for the officers to rely upon it. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).

State police officer Harder, who arrested appellants Scheidler and Cooke, also was properly granted summary judgment on the grounds of qualified immunity. It was objectively reasonable for Officer Harder to believe that he had probable cause to arrest appellant Scheidler based upon the undisputed fact that he was present when Scheidler spoke out loudly during the service and attempted to unfurl a banner reading "Sacrilege," apparently intending to attract the attention of Governor-elect Wilson. Officer Harder arrested appellant Cooke after Cooke approached

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within three feet of the Governor-elect and stated loudly, "What are you going to do about murdering millions of Unborn children in this state?" It would be reasonable to interpret this statement, made in such close proximity, as threatening. *See Hunter v. Bryant*, 502 U.S. 224, 228-29 (1991) (even assuming Secret Service agents lacked probable cause for an arrest made in an effort to protect the President, the Court held them entitled to qualified immunity); *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (qualified immunity protects all but the plainly incompetent or those who knowingly violate the law); *ActUP!/Portland*, 988 F.2d at 871 (police officers who objectively believe that their conduct is lawful in light of clearly established principles are immune from civil damages); *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1443 (9th Cir. 1991) ("Even absent probable cause, qualified immunity is available if a reasonable police officer could have believed that his or her conduct was lawful.").

State Officer Lt. Hensley, supervisor of the Custody Officers, was properly granted summary judgment. His subordinates acted lawfully in accepting custody of appellants. In the absence of constitutional injury caused by his subordinates, he cannot be liable for failure to supervise.

E. CITY OF SACRAMENTO:

Appellants made two claims against the City of Sacramento. First, that it had a policy or a custom of not inquiring into the validity of arrests made by citizens. Second, that it failed to adequately select, train, and supervise Sgt. Dowden, who held

appellant Reali in custody after her arrest. Summary judgment was proper as to both claims. Appellants alleged no facts to support the claim that the City has either a policy or custom of not inquiring into the validity of arrests made by citizens. *Monell*, 436 U.S. at 694. A policy may be shown "where – and only where – a deliberate choice to follow a course of action is made [by policymakers] from among various alternatives." *Meehan v. County of Los Angeles*, 856

F.2d 102, 107 (9th Cir. 1988) (quoting *Pembaur v. Cincinnati*, 475 U.S. 469, 483-84 (1986)). It is the Petitioner's burden to prove official policy by more than "bald allegation." *Polk County v. Dodson*, 454 U.S. 312, 326 (1981). She must show that official policy is "the moving force of the constitutional violation" in order to establish liability. *Monell*, 436 U.S. at 694. At the "very least there must be an affirmative link between the policy and the particular constitutional violation alleged." *Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985). The appellants have shown neither a policy or consequences from it that would establish municipal liability here.

The district court properly dismissed appellants' claims against the City for failure to adequately select, train, and supervise Sgt. Dowden. When a person sues under § 1983 for an allegedly unconstitutional arrest, the city cannot be held liable absent a constitutional violation by the arresting officer. Grossman, 33 F. 3rd at 1203 (quoting City of Los Angeles v. Heller, 475 U.S. 796 (1986)). The specific constitutional violation alleged here is that Sgt. Dowden used excessive force against appellant Reali in removing her from the Cathedral and while she

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was in his custody. However, the jury's finding that the force Dowden used was reasonable eliminates appellants' constitutional claim against the City, because the appellant suffered no constitutional injury. Summary judgment was properly granted.

F. CITY POLICE OFFICERS:

Finally, the district court properly granted summary judgment to City police officer Lt. Twilling, who supervised the City police officers present in the Cathedral. Appellants offered no evidence that he participated directly in the arrests at issue. The officers that he supervised acted constitutionally in accepting custody of the appellants. He also is entitled to qualified immunity for accepting custody for appellants Reali and Szabo from state police officers outside of the Cathedral because it was objectively reasonable for him

to believe his actions were authorized by statute. See Augustine v. McDonald, 770 F.2d 1442, 1445-46 (9th Cir. 1985) (an officer is entitled to qualified immunity where his or her actions were authorized by a statute that was not clearly unconstitutional).

II. Recusal Motion

We review the denial of a motion for recusal for an abuse of discretion. *E & J Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1294 (9th Cir. 1992). Appellant's contend that Judge Burrell's connections to both Governor Wilson and the City of Sacramento were such that his impartiality might reasonably be questioned, and that he should have recused himself pursuant to 28 U.S.C., §

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455. *See Preston v. United States*, 923 F.2d 731, 734 (9th Cir. 1991) (Plaintiffs must present facts demonstrating that a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned). We reject this contention. Senator Wilson's recommendation alone does not establish a basis for questioning Judge Burrell's impartiality. *See Home Placement Service v. Providence Journal Co.*, 739 F.2d 671, 675 (1st Cir. 1984), *cert. denied*, 469 U.S. 1191 (1985). Nor does Judge Burrell's former employment as a city attorney establish a sufficient basis for questioning his impartiality. *See United States v. Heffington*, 952 F.2d 275, 278-79 (9th Cir. 1991) (holding that activities during government employment that are unrelated to the merits of the case at issue do not require recusal); *Tedder v. Odel*, 890 F.2d 210, 212 (9th Cir. 1989) (disqualification based on government employment is required when judge has participated earlier in a governmental capacity in the same proceeding). Accordingly, we affirm the denial of appellants' recusal motion.

III. Jury Instructions

Appellants claim that the jury was misdirected with instructions that permitted them to "consider protected speech as a crime" and that this constitutes reversible error. They did not, however, object at trial to these instructions, as re-

quired by Fed. R. Civ. P. 51, which requires that a party state distinctly the matter objected to and the grounds for that objection at trial. The consequences of this failure is waiver of the right to

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claim instructional error on appeal. *See Hammer v. Gross*, 932 F2d 842, 847 (9th Cir.), *cert. denied*, 502 U.S. 980 (1991); *Deland v. Old Republic Life Insurance Co.*, 758 F.2d 1331, 1337 (9th Cir. 1985). Because no objection was made, we affirm the jury verdicts reached at trial.

IV. Conclusion

We affirm. Summary judgment on the § 1983 claims was properly granted based upon lack of standing, qualified immunity, or lack of municipal or supervisorial liability. Appellants did not object to jury instructions. The other alleged trial errors did not present a basis for overturning the jury verdicts in favor of defendants. We deny the state Appellees' request for attorney's fees. Although the claims made by appellants ultimately lack merit, they relate to important constitutional rights, and some of the claims went to trial. We decline to find them frivolous. *See Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) (a fee award will not be made unless the Petitioner's action was frivolous, unreasonable or without foundation, even though not brought in subjective bad faith.).

AFFIRMED

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EXCERPTS –
CONSTITUTION OF THE UNITED STATES

Preamble

"We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to **ourselves and our Posterity**, do ordain and establish this Constitution for the United States of America."

Amendment 1 (Dec. 15, 1791)

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment 4 (Dec. 15, 1791)

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment 14 (July 28, 1868)

"§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

EXCERPTS– THE CALIFORNIA PENAL CODE

California Penal Code § 142 (1990)

"(a) Any peace officer who has the authority to receive or arrest a person charged with a criminal offense and willfully refuses to receive or arrest such person shall be punished by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment in the state prison, or in a county jail not exceeding one year, or by both such fine and imprisonment.

"(b) Notwithstanding subdivision (a), the sheriff may determine whether any jail, institution, or facility under his direction shall be designated as a reception, holding, or confinement facility, or shall be used for several of such purposes, and may designate the class of prisoners for which such facility shall be used."

California Penal Code § 302 (1990)

"**Disturbing religious meetings; punishment; community service; waiver** [¶] (a) Every person who willfully disturbs or disquiets any assemblage of people met for religious worship at a tax-exempt place of worship, by profane discourse, rude or indecent behavior, or by any unnecessary noise, either within the place where the meeting is held, or so near it as to disturb the order and solemnity of the meeting, is guilty of a misdemeanor punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in the county jail for a period not exceeding six months, or by both fine and imprisonment. [¶] (b) A court may require performance of community service of not less than 20 hours and not exceeding 40 hours as an alternative to imprisonment and fine. [¶] (c) In addition to the penalty set forth in subdivision (a), a person who has suffered a previous conviction of a violation of this section or section 403, shall be required to perform community service of not less than 40 hours and not exceeding 80 hours. [¶] (d) In addition to the penalty set forth in subdivision (a), a person who has suffered two or more previous convictions of a violation of this section or section 403, shall be required to perform community service of not less than 80 hours and not exceeding 120 hours. [¶] (e) The existence of any fact which would bring a person under subdivision (c) or (d) shall be alleged in the complaint, information or indictment and either: (1) Admitted by the Respondent in open court. [¶] (2) Found to be true by a jury trying the issue of guilt. [¶] (3) Found to be true by the court where guilt is established by a plea of guilty or nolo contendere. [¶] (4) Found to be true by trial by court sitting without a jury. [¶] (f) Upon conviction of any person under this section for disturbances of religious worship, the court may, in accordance with the victim's consent, order the Respondent to perform a portion of, or all of, the required community service at the place where the disturbance of religious worship occurred. [¶] (g) The court may waive the mandatory minimum requirements for community service whenever it is in the interest of justice to do so. When a waiver is granted, the court shall state on the

record all reasons supporting the waiver. (*Enacted 1872. Amended by Stats. 1905, c. 499, p. 657, § 1; Stats. 1990, c. 822 (S.B.2483), § 1.*)" Before January 1, 1991, the operative section read "Every person who willfully disturbs or disquiets any assemblage of people met for religious worship at a tax-exempt place of worship, by profane discourse, rude or indecent behavior, or by any unnecessary noise, either within the place where the meeting is held, or so near it as to disturb the order and solemnity of the meeting, is guilty of a misdemeanor."

California Penal Code, § 834 (1990)

"**Arrest Defined; persons authorized to arrest.** [¶] ARREST DEFINED. BY WHOM DEFINED. Arrest is taking a person into custody, in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person."

California Penal Code, § 836(b) (1990)

"Any time a peace officer is called out on a domestic call, it shall be mandatory that the officer make a good faith effort to inform the victim of his or her right to make a citizen's arrest. The information shall include advising the victim how to safely execute the arrest."

California Penal Code, § 837 (1990)

"**Private persons; authority to arrest** [¶] **ARRESTS BY PRIVATE PERSONS.** A private person may arrest another: [¶] 1. For a public offense committed or attempted in his presence. [¶] 2. When the person arrested has committed a felony, although not in his presence. [¶] 3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it. (*Enacted* 1872)"

No. 96-1856

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

ALBIN A. RHOMBERG, JOHN BURNS, MICHAEL BURNS, THERESA REALI, SCOTT KILEY, JACK COOKE, JOSEPH SCHEIDLER, AND ESTATE OF JOHN SZABO,

Petitioners,

vs.

PETE WILSON; BOB WHITE; MARTY WILSON; PETE WILSON FOR GOVERNOR CAMPAIGN COMMITTEE; PETE WILSON INAUGURAL COMMITTEE; RUSSELL COLLIAU; KAREN McGAGIN; TOM COOPER; DUANE LOWE; MONTEY HENSLEY; JAMES PENNELL; R. BARTUCCO; J.E. EVERETT; P.D. HARDER; W.E. MACDONALD; A. PEREZ; D.H. PETERS; PETER OSTERGAR; DANIEL LUNGREN, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; CITY OF SACRAMENTO; GREGORY TWILLING; & P. DOWDEN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NIELSEN, MERKSAMER, PARRINELLO, MUELLER & NAYLOR, LLP
JAMES R. PARRINELLO, Esq.
California State Bar No. 063415
Counsel of Record
ANDREW M. WOLFE, Esq.
California State Bar No. 114076
591 Redwood Highway, #4000
Mill Valley, California 94941
Telephone: (415) 389-6800
Facsimile: (415) 388-6874

Attorneys for Respondents Russell Colliau, Tom Cooper, Martin Wilson, The Pete Wilson Campaign Committee and The 1991 Inaugural Committee

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

The questions which apply to Respondents Russell Colliau, Tom Cooper, Martin Wilson, the Pete Wilson Campaign Committee and the 1991 Inaugural Committee are as follows:

1. Must a federal judge recuse himself where one of the parties previously recommended him to be nominated for a federal judgeship, or where he was employed as an attorney by a municipal defendant two years before the acts giving rise to the lawsuit?

2. Does the Petition raise any compelling reasons to grant review, within the meaning of Rule 10 of the Supreme Court Rules, concerning the jury verdicts in favor of Russell Colliau and the Inaugural Committee or the summary judgments in favor of Tom Cooper, Marty Wilson and the Pete Wilson Campaign Committee?

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I. INTRODUCTION.

This Brief In Opposition is submitted on behalf of Respondents Russell Colliau, the 1991 Inaugural Committee – a California nonprofit corporation (Inaugural Committee), Martin Wilson, Tom Cooper and the Governor Pete Wilson Committee (Campaign Committee). These Respondents were referred to in the District and Circuit Courts, and are sometimes collectively referred to here, as the "Committee Defendants." At the outset it should be noted that, although there are nine Petitioners in this Court, *only* one, Albin Rhomberg, appealed the judgments below in favor of the Committee Defendants. This brief is thus limited to a discussion of the Petition for Certiorari as it applies to Rhomberg's claims against the Committee Defendants.

We respectfully submit that Rhomberg's Petition for Certiorari should be denied. The Petition fails to establish the existence of any "compelling reason" to grant certiorari as required by Rule 10 of the Supreme Court Rules; nor does it articulate any coherent reason why the judgments below in favor of the Committee Defendants should be reversed. A cursory review of the record below reveals that the District Court quite properly entered summary judgment against Rhomberg and in favor of defendants Tom Cooper, Martin Wilson and the Campaign Committee. And, following a nine-day trial, a unanimous jury rendered an unassailable verdict against Rhomberg and in favor of Committee Defendants Russell Colliau and the Inaugural Committee. A panel of the U.S. Court of Appeals for the Ninth Circuit correctly and unanimously affirmed these judgments.

II. STATEMENT OF THE CASE.

A. Proceedings And Disposition Below.

Rhomberg and nine other plaintiffs filed their complaint in the District Court below on January 6, 1992. The case was assigned to Judge Garland Burrell on March 13, 1992. (Committee Defendants' Excerpts of Record filed in the U.S. Court of Appeals for the Ninth Circuit (Comm. ER) at 9.) The District Court set a discovery cutoff date of March 3, 1994 and considerable discovery ensued. On February 14, 1994, the District Court issued an order denying plaintiffs' motion to extend the discovery cut-off date. (Comm. ER at 22-25.) On March 18, 1994, plaintiffs filed a motion to recuse Judge Burrell. (Appellant's Excerpts of Record Filed in the Ninth Circuit (AER) at 1559.) The recusal motion was denied after hearing. (City Appellees Excerpts of Records (City ER) at 1-3.)

The District Court entered an Order on February 23, 1995, granting the Committee Defendants' summary judgment motions in part and denying them in part. (AER at 1257-1319.) Plaintiffs moved for reconsideration on March 6, 1996 (AER at 1320), which motion was granted in part and denied in part. The result of these motions was that summary judgment was granted in favor of Tom Cooper, Martin Wilson and the Campaign Committee against Rhomberg; and the summary judgment motions by Colliau and the Inaugural Committee against Rhomberg were denied.[1] Rhomberg's claims

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[1] During this time period, a settlement was reached between the Committee Defendants and all plaintiffs except Rhomberg; this is why only Rhomberg appealed the judgments entered below in favor of the Committee Defendants.

against Colliau and the Inaugural Committee were tried to a six-member jury commencing on May 5, 1995.[2] After a nine-day trial, the jury deliberated for one hour and returned a unanimous verdict in favor of Colliau and the Inaugural Committee.

Rhomberg made no motion for a new trial or any other post-trial relief.

Rhomberg timely appealed to the Ninth Circuit and, on February 18, 1997, the Court of Appeals unanimously affirmed the judgments entered in favor of all Committee Defendants against Rhomberg.

B. Statement Of Facts Relevant To The Issues Presented For Review.[3]

This lawsuit arose out of an incident which occurred at the Roman Catholic Cathedral of the Blessed Sacrament in downtown Sacramento on January 6, 1991, during an ecumenical prayer service which was part of the activities relating to the inauguration of Pete Wilson to his first term as Governor. (AER at 1-51.) Wilson was elected Governor in November of 1990 and was to be sworn into office on Monday, January 7, 1991.

---

[2] The claims of plaintiff Theresa Reali against certain State and City Defendants and the claims of plaintiffs John and Michael Burns against certain other defendants were also tried.

[3] The Petition for Certiorari presents seven questions for review. The only questions which appear to have any relationship to Rhomberg's claims against the Committee Defendants are nos. 1 and 7. Even that, however, is far from clear.

Shortly after the election, the Governor's supporters established a nonprofit corporation called the 1991 Inaugural Committee which organized various events relating to the inauguration of Governor Wilson (e.g., the swearing-in ceremony, several inauguration balls/galas, and the ecumenical prayer service). Many people were expected to come to Sacramento from around the state and country for the inauguration, and the prayer service was planned to offer the prayers of different faiths for the new administration. (RT at 457, 691, 884, 890, 904.)

The Cathedral's pastor, Monsignor James Kidder, and the Bishop of Sacramento, Francis Quinn, gave permission to hold the ecumenical prayer service in the Cathedral of the Blessed Sacrament. In fact, both the Monsignor and the Bishop were co-celebrants of the service, as were clergy from many other faiths. (RT at 760, 884, 888, 894, 901, 902, 904, 910 & 911.)

A small group of anti-abortion protestors[4] (including appellant Rhomberg) objected to the ecumenical prayer service; since Governor-elect Wilson was pro-choice, they believed it would be sacrilegious to use the Cathedral for a prayer service relating to his inauguration as Governor. Monsignor Kidder and Bishop Quinn disagreed with these objections and reaffirmed that the ecumenical service was an appropriate event to be held in the Cathedral. (RT 905-909, 1044-1053.) The Governor-elect had no active role in the service; he was merely an attendee.

---

[4] Later many of these protestors would become plaintiffs in this case.

Respondent Russell Colliau was a soon-to-be college graduate who was interested in politics. After the election he was employed as a mailroom clerk in the Governor-elect's transition office. (Reporter's Transcript on Appeal (RT) at 683-688.) Respondent Tom Cooper was an acquaintance of Colliau and was an Inaugural Committee volunteer. Cooper asked whether Colliau would like to be the volunteer head usher at the prayer service. Colliau agreed. (RT at 690-692.)

Several days before the ecumenical service was held, Colliau met at the Cathedral with Monsignor Kidder and a number of other people involved with the event, including several State Policemen. The State Police explained standard security precautions, including what would happen in the event there was a disturbance inside the Cathedral. In such event, the State Police told Colliau that he should approach the persons making the disturbance, ask them to stop and tell them if they refused they would be placed under citizen's arrest; if they persisted, he was to nod to the State Police and that would indicate the person was placed under citizen's arrest, in which event the State Police would remove the person from the Cathedral. (RT at 693-698; see also RT at 884-886.)

The State Police told Colliau that this was the proper procedure for dealing with a disturbance inside the Cathedral and they gave him a copy of Penal Code section 302, which specified that disturbances of religious services were misdemeanors. (RT at 693-698.) Monsignor Kidder was present during this meeting. He testified at trial that security issues such as these were left to the discretion of the authorities, and that the Church would have no role in them, but would leave decisions such as

whether or not to arrest protestors in the discretion of the civil authorities. Bishop Quinn concurred that such decisions were left up to the civil authorities. (RT at 884-886, 911-12, 1507.)[5]

During the week prior to the ecumenical service, Rhomberg and several other anti-abortion advocates created an *ad hoc* organization called the Anti-Desecration League and helped to draft several threatening letters to the Governor-elect. (RT 1107-1127, 1738.) These three letters showed that the intention of Rhomberg and others was to disrupt the ecumenical service by standing and speaking loudly the words of prayer which were part of the planned service.

One letter, dated January 4, 1991, stated in pertinent part as follows:

> This letter serves to notify you [Governor-elect Wilson], your wife Gayle, and your political staff that you are denied the use of the Cathedral of the Blessed Sacrament (and any other Catholic facility) for the inauguration event you have tried to orchestrate there on Sunday morning, January 6, 1991, at 10:30 a.m.
>
> The request itself is an obscenity, a depraved act by an avowed abortion zealot who

---

[5] As this trial testimony makes clear, the suggestion in the Petition (at p. 3) that Church officials disapproved of the arrests in the Cathedral is incorrect. Petitioners' claim (Petition at p. 7) that Bishop Quinn and Monsignor Kidder did not believe Petitioners' activities during the prayer service were disruptive, is likewise incorrect. The clergymen gave no such testimony and the record citations in the Petition do not support this claim. (See also Comm. ER at 10-16.)

> is attempting to gain political advantage by seeking to create the appearance of Church acceptance during your inaugural event.
>
> * * *
>
> We obey the words of Pope John Paul II:
>
> "We will stand up every time that human life is threatened. When the sacredness of life before birth is attacked, we will stand up and proclaim that no one ever has the authority to destroy unborn life."

(Comm. ER at 1-3; see also RT at 1112-13, admitting letter into evidence.)

Another letter, dated January 5, 1991, stated in pertinent part:

> If you [Governor-elect Wilson] choose to persist without change in your defense of totally unrestricted abortion even including little girls ("sex-selection") right up to birth, *we will confront you tomorrow in the Cathedral and continually thereafter*. If you choose to ignore the moral issue we defend, *you can be assured of* continual, and relentless embarrassment and confrontation through the lawful use of public protest: picketing, trumpeting, shouting, taped, loud, multiple recordings of the pitiful wail of babies in mortal danger, and *standing prayer in unison throughout the the [sic] Cathedral tomorrow*.

(Emphasis added; Comm. ER at 4-7; see also RT at 1117-18, admitting letter into evidence.)

The third letter, dated January 6, 1991,[6] stated in pertinent part as follows:

> Our first wave of Faithful Catholics are now attending the 8:00 a.m. Mass at the Cathedral of the Blessed Sacrament. . . . They will claim sanctuary in the ancient tradition of the Roman Catholic Church, and remain in the Cathedral until 11:30 a.m.
>
> Many others who hold tickets will be coming in soon, with other unticketed people to stand up and proclaim to you, " – **we will stand up and proclaim that no one ever has the authority to destroy unborn life."**

(Emphasis in original; Comm. ER at 8; see also RT at 1123, admitting letter into evidence.)

The ecumenical service was scheduled for 10:30 a.m. on Sunday morning, January 6, 1991.[7] There was a regularly scheduled 8:00 a.m. mass at the Cathedral preceding the ecumenical service. Numerous persons (including Rhomberg) attended that mass, sat in seats scattered throughout the Cathedral, remained afterward, and then moved into the first several rows of pews on either side of the main aisle, directly in front of the altar. (RT at 705-07, 914-15.) These pews had been reserved for the family of the Governor-elect. Monsignor Kidder asked

---

[6] Rhomberg helped draft this letter on the evening of January 5 in anticipation of the next morning's events. (Comm. ER at 1122-23.)

[7] The regularly scheduled 10:00 a.m. mass was held in the lower hall of the Cathedral, where such masses were customarily held when the Cathedral was being simultaneously used for other purposes. (RT at 914.)

these people (including Rhomberg) to move, but they refused. (RT at 915-16.) Rather than provoke a confrontation, Monsignor Kidder, with Bishop Quinn's concurrence, asked the State Police to allow these people to remain, as they were at that time not doing anything disruptive. (RT 919-920.) Thus the seating for the Governor-elect and his family was changed. (RT at 710.)

During the opening hymn of the ecumenical service (which began with a solo vocalist), many of the people who were sitting in the front rows stood up and began speaking very loudly the words of the Lord's Prayer; this was not part of the ecumenical service and in fact disrupted that service. (RT at 645-46, 657, 721-23, 891, 921.) Rhomberg was part of this group. In accordance with the previous instructions given by the State Police, Colliau approached several of these people, asked them to stop the disruption, told that if they continued he would place them under citizen's arrest and, when they refused, he signaled to the State Police who removed the people from the Cathedral. (RT at 713-15.)

One such person was Rhomberg. From a distance, Colliau heard Rhomberg projecting his voice loudly and approached him. Colliau told Rhomberg he was disrupting the service, asked him to stop and advised him he would be placed under citizens arrest if he continued. Rhomberg ignored him and continued projecting his voice loudly, telling Colliau that he (Colliau) was interrupting him (Rhomberg). (RT at 721-23, 735-41, 1014.) Rhomberg's voice was very loud and disrupted the service. (RT at 739-41, 1649-50, 1682-83.) It was Rhomberg's intention to continue standing and saying the words of

prayer throughout the entire ecumenical service. (RT at 739-41, 1740-41.)

Two State Policemen were in the pew behind Rhomberg and witnessed these events. Colliau signaled towards them and they approached Rhomberg and asked him to come with them. Instead of complying, Rhomberg went limp, collapsed to his knees, and began screaming "holy sanctuary." The two State Policemen dragged him out of the Cathedral; he stopped screaming and got back on his feet only when they got outside of the Cathedral. (RT at 1650-52, 1681-84.)

Tom Cooper

Tom Cooper was a volunteer for the Inaugural Committee and worked on the ecumenical service. He had no contact whatever with Rhomberg, did not place Rhomberg under citizens arrest and was not part of any conspiracy. Summary judgment was granted in Cooper's favor against Rhomberg and the Ninth Circuit affirmed. For record cites and further analysis, see Argument, *infra*, III.B.1.

Martin Wilson

Martin Wilson held the position of director of the Inaugural Committee. He attended the ecumenical prayer service with his family and sat with the rest of the congregation. He had no contact whatever with Rhomberg, did not place Rhomberg under citizens arrest and was not part of any conspiracy. Summary judgment was granted in Martin Wilson's favor against Rhomberg and the Ninth

Circuit affirmed. For record cites and further analysis, see Argument, *infra*, III.B.2.

The Campaign Committee

The Campaign Committee had no involvement in the ecumenical prayer service. Rhomberg nevertheless claimed that the Campaign Committee was liable as the "alter ego" of the nonprofit Inaugural Committee. These two entities were separate and distinct; neither controlled the other and neither was a mere conduit for the other. The trial court granted summary judgment against Rhomberg and in favor of the Campaign Committee and the Ninth Circuit affirmed. For record cites and further analysis, see Argument, *infra*, III.B.3.

Colliau and the Inaugural Committee

After nine days of trial, Rhomberg's claims were submitted to a six-member federal jury. The jury was presented a special verdict form with multiple questions (to which no objections were interposed by Rhomberg or the other plaintiffs). After deliberating for approximately one hour, the jury unanimously rendered its verdict against Rhomberg, as follows:

> Do you find by a preponderance of the evidence that defendant Russell Colliau made a citizens arrest of plaintiff Albin Rhomberg without probable cause in violation of his fourth amendment rights?
>
> Response: no.

> Do you find by a preponderance of the evidence that defendant Colliau violated plaintiff Rhomberg's first amendment right to freedom of speech?
>
> Response: no.
>
> Do you find by a preponderance of the evidence that defendant Colliau violated plaintiff Rhomberg's first amendment right to freedom of religion?
>
> Response: no.

(Comm. ER at 36-41; RT at 2162-67.) Since Rhomberg's claims against the Inaugural Committee were derivative of his claims against Colliau, the verdict was thus in favor of the Inaugural Committee as well as Colliau.

III. ARGUMENT.

The Petition articulates no "compelling reasons" within the meaning of Rule 10 to grant a writ of certiorari as to the judgments entered in favor of any of the Committee Defendants. Although the Petition mentions in passing the summary judgments entered in favor of Respondents Russell Colliau, Martin Wilson and the Campaign Committee, it contains no explanation whatever as to why Rhomberg believes the grant of summary judgment was improper. Nor does the Petition make any specific claim of error as to the jury verdicts in favor of Russell Colliau and the Inaugural Committee. We will, however, address issues which appear to be raised by Rhomberg's Petition and may arguably apply to the Committee Defendants.

A. The Recusal Motion Was Properly Denied.

Judge Burrell's order denying the motion to recuse was a proper exercise of judicial discretion. In the courts below Rhomberg argued recusal was required because defendant Pete Wilson, while a U.S. Senator, recommended that President Bush appoint then-attorney Burrell to the federal bench, and that Burrell had been employed in the Sacramento City Attorney's office approximately two years prior to the events giving rise to this lawsuit.

Rhomberg contends that Judge Burrell's prior employment with the Sacramento City Attorney's office disqualifies him as the judge in this case, even though he was not so employed at the time of any events at issue in this lawsuit. Rhomberg's argument has no merit. Prior government service precludes a District Judge from adjudicating cases only where he or she has served in governmental employment and in that capacity participated as counsel, advisor or material witness concerning the proceeding or expressed an opinion concerning the merits of the controversy. 28 U.S.C. § 455(b)(3). Rhomberg concedes, however, that the matters at issue in this lawsuit were not pending in the Sacramento City Attorney's office at the time Judge Burrell was employed there. (Comm. ER at 32.) Thus, recusal was plainly not required. See, e.g., *United States v. DeLuna*, 763 F.2d 897, 907-908 (8th Cir. 1985); *Jenkins v. Bordenkircher*, 611 F.2d 162, 165-167 (6th Cir. 1979); *United States v. Kelly*, 556 F.2d 257, 262-263 (5th Cir. 1977); *Gravenmier v. United States*, 469 F.2d 66 (9th Cir. 1972).

Further, Rhomberg cited no cases below (and cites none here) to support his assertion that Judge Burrell was required to recuse himself because defendant Wilson, while a United States Senator, recommended him for nomination to the federal bench. Such a claim would appear to be based on 28 U.S.C. § 144, 455(a) or 455(b)(1). Section 144 requires recusal upon a showing "of personal bias or prejudice." Section 455(a) precludes a judge from adjudicating any case in which his or her impartiality might reasonably be questioned, as evaluated on an objective basis. *Liteky v. United States*, 510 U.S. 540, 127 L.Ed.2d 474 (1994). Section 455(b)(1) is essentially duplicative of section 144. *Liteky*, 510 U.S. at 548, 127 L.Ed.2d at 486.

Rhomberg cites no authority supporting the allegation that Judge Burrell had personal bias or prejudice (i.e., "a favorable or unfavorable disposition or opinion that is somehow *wrongful or inappropriate*," *Liteky*, 127 L.Ed.2d at 488), or which would provide an objective basis for reasonably questioning his impartiality. Further, Rhomberg cites no authority to support the theory that a federal judge is disqualified from a case in which a party had previously recommended the judge for nomination to public office. The law is to the contrary. *Vangarelli v. Witco Corporation*, 808 F.Supp. 387 (D.N.J. 1992) [rejecting recusal motion based on fact that defendant governor had previously appointed judge to chair a state commission]; *Hirschkop v. Virginia State Bar*, 406 F.Supp. 721 (N.D.Va. 1975) [rejecting recusal motion based in part upon allegation that defendant governor supported nomination of judge to federal bench].

Indeed, it would be difficult to see how our system of government could properly function if judges were thought to be too beholden to the executive branch officials who appoint them and the legislative branch officials who confirm them (and who appropriate the judicial branch budget) to decide cases in which those officials had an interest. See, e.g., *In the Matter of Bradford Mason, et al.*, 916 F.2d 384, 386-387 (7th Cir. 1990):

> Reasonable, well informed observers of the federal judiciary understand that judges with political friends or supporters regularly cast partisan interests aside and resolve cases on the facts and law. Judges with tenure need not toady, and don't. Chief Justice Burger wrote an opinion that led to the resignation of the President who gave him that office (citation omitted). Justice Holmes wrote a dissent in an antitrust case that President Roosevelt had personally decided to pursue, despite being a frequent guest at the Roosevelts table (citation omitted).

A further reason for denial of the recusal motion is that it was filed more than two years after the case was assigned to Judge Burrell. Plaintiffs' motion was based upon facts that had been matters of public record for years and was thus untimely. *Molina v. Rison*, 886 F.2d 1124, 1131 (9th Cir. 1989); *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280 (9th Cir. 1992).

B. The Petition Raises No Questions, Compelling Or Otherwise, Concerning The Grant Of Summary Judgment In Favor Of Defendants Tom Cooper, Martin Wilson And The Campaign Committee.

Although the Petition for Writ of Certiorari identifies Tom Cooper, Russell Colliau and the Campaign Committee

as Respondents, it does not articulate any grounds for challenging the summary judgments entered in their favor. Thus, Rhomberg's petition as to these Respondents should be denied on that basis alone. Moreover, the grant of summary judgment as to all three was correct.

Summary judgment is proper under Federal Rule of Civil Procedure 56(c) when there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317 at 323 (1986). Once Cooper, Wilson and the Campaign Committee showed that there was an absence of evidence to support Rhomberg's case, *id.*, at 325, Rhomberg was required to make a sufficient showing on matters on which he had the burden of proof at trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87 (1986). To establish the existence of a factual dispute, Rhomberg was required to tender evidence of specific facts in the form of affidavits, or admissible discovery, or both, in support of his contention that a factual dispute existed as to his claims against Cooper, Martin Wilson or the Campaign Committee. Fed.R.Civ.P. 56(e); *Matsushita*, 475 U.S. at 586-87. Rhomberg also was required to demonstrate that the fact in contention was material, i.e., a fact that might affect the outcome of the suit under the governing law, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Id.*, at 251-52.

Rhomberg did not meet his burden and the District Judge was correct in granting summary judgment in favor of Tom Cooper, Martin Wilson and the Campaign Committee.

1. Tom Cooper.

Cooper's motion for summary judgment was based upon testimony that he did not participate in the arrest of any plaintiff – including Rhomberg, and was unaware of and was not a participant in any conspiracy to arrest or remove any person from the Cathedral of the Blessed Sacrament on January 6, 1991. (AER at 666-667.) *No* evidence whatever was offered to support Rhomberg's claims against Cooper or to rebut the evidence submitted by Cooper that he had no involvement in Rhomberg's arrest.[8] In fact, Rhomberg expressly admitted that Cooper was unaware of and was not a participant in any conspiracy to arrest or remove him from the Cathedral. (AER at 740.)

2. Martin Wilson.

Martin Wilson moved for summary judgment based on testimony that he did not participate in the arrest of any person during the ecumenical prayer service and that he was not aware of and did not participate in any conspiracy to arrest or remove any person from the Cathedral during the service. (AER at 662-663.) Martin Wilson was with his family in the congregation during

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[8] The only evidence offered in opposition to the testimony that Cooper did not participate in any arrests was a videotape that could possibly be construed as indicating that a person resembling Cooper was possibly involved in the arrest of plaintiff John Szabo. (AER at 738.) However, Rhomberg did not argue, let alone produce evidence, that Cooper was involved in the arrest of Rhomberg himself.

the service. (Comm. ER at 17-21.) Martin Wilson did not even learn until months later that Colliau was even involved in any citizen's arrests that day. (AER 81-83, 85.)

Rhomberg offered no evidence to rebut or dispute the evidence submitted in support of Martin Wilson's motion. Further, Rhomberg (and all other plaintiffs) expressly admitted below that Martin Wilson did not participate in any arrests during the ecumenical service and was neither aware of nor a participant in any conspiracy to arrest or remove people from the Cathedral. (AER at 738-739.)

3. The Campaign Committee.

The Campaign Committee moved for summary judgment based upon testimony that the Campaign Committee had no involvement with, and did not participate in any way in, the ecumenical prayer service or other events relating to the inauguration of Governor Wilson in January 1991. (AER at 664-665.) Rhomberg offered no evidence showing that the Campaign Committee engaged in any wrongful conduct. (AER at 1275.) Rhomberg argued below that the Campaign Committee was liable for acts of the Inaugural Committee on the theory that it was the "alter ego" of the Inaugural Committee. (AER at 1275.)

To establish alter ego liability, Rhomberg would have had to produce evidence establishing the following elements: (1) one Committee controlled the other; (2) one Committee was a mere conduit for the other; and (3) allowing the Campaign Committee to maintain a legally separate existence would constitute a fraud or injustice

upon the plaintiffs. See generally 15 Cal.Jur.3d, Corporations, § 37; *Marr v. Postal Union Life Ins. Co.*, 40 Cal.App.2d 673, 681 (1940). Rhomberg, however, offered no such evidence.

The unrebutted testimony below showed: that the Campaign Committee was an unincorporated association and a registered political committee pursuant to Cal. Gov. Code §§ 81000 et seq.; that the Campaign Committee was distinct and separate from the 1991 Inaugural Committee, which was a nonprofit corporation; that the Campaign Committee had no control or influence over the activities of the 1991 Inaugural Committee and that the 1991 Inaugural Committee had no control or influence over the activities of the Campaign Committee. (AER at 664-665.)

C. The Petition Raises No Compelling Reason For Review Of The Jury Verdicts In Favor Of Colliau And The Inaugural Committee.

Rhomberg's Petition for Writ of Certiorari scarcely mentions the unanimous jury verdicts in favor of Russell Colliau and the Inaugural Committee. Although the Petition devotes much time arguing the wisdom of this Court's abortion jurisprudence,[9] it fails to identify any trial error which even arguably could serve as a basis to overturn these jury verdicts.

The Petition vaguely suggests that the jury was somehow "misled" by the trial court concerning the rights of the unborn or the right of Rhomberg to protect

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[9] Such claims do not appear to be directed at the Committee Defendants and we will not respond to them.

his religious beliefs. Rhomberg, however, made no such objections to the jury instructions. Nor did Rhomberg object to the special verdict form which covered these same subjects. The jury was given ample opportunity to consider Rhomberg's claims, and it unanimously rejected them.

To the extent Rhomberg's appeal could conceivably be construed as claiming the jury was erroneously instructed, his failure to make specific objections prior to the submission of instructions to the jury bars him from doing so now. Rule 51 of the Federal Rules of Civil Procedure expressly provides in pertinent part:

> No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, *stating distinctly the matter objected to and the grounds of the objection.*

Id., emphasis added; see also, *City of Springfield v. Kibbe*, 480 U.S. 257, 258-260, 107 S.Ct. 1114, 94 L.Ed.2d 293, rehearing denied, 481 U.S. 1033 (1987).

The only other argument that Rhomberg could possibly have made on appeal is that there was insufficient evidence to support the jury verdicts against him. Such a claim, however, is not made in the Petition for Certiorari and, even if it were, it would be patently frivolous. Rhomberg made no motion under Federal Rule of Civil Procedure 50 at trial,[10] and this precludes him from contesting the sufficiency of the evidence to support the

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[10] Two of his fellow plaintiffs at trial made such a motion, but not Rhomberg. (RT at 1916-17.)

verdicts in favor of Colliau and the Inaugural Committee. *United States v. 33.5 Acres, Okanogan County*, 789 F.2d 1396, 1400 (9th Cir. 1986); 5A J. Moore, *Moore's Federal Practice*, ¶50.05[1] at pages 50-56; 9A C. Wright and A. Miller, *Federal Practice and Procedure* (1995), § 2536 at pages 329-330; see e.g., *Johnson v. New York, New Haven & Hartford RR. Co.*, 344 U.S. 48, 49 (1952), *citing Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217, 67 S.Ct. 752, 91 L.Ed. 849 (1947) and *Globe Liquor Co, Inc. v. San Roman, et al.*, 332 U.S. 571, 98 S.Ct. 246, 92 L.Ed. 177 (1947); *Neely v. Martin K. Eby Co.*, 386 U.S. 317, 87 S.Ct. 1072, 18 L.Ed.2d 75 (1967).

IV. CONCLUSION.

It is respectfully submitted that the Petition for Writ of Certiorari filed by Albin Rhomberg against Russell Colliau, Tom Cooper, Martin Wilson, the Pete Wilson Campaign Committee and the 1991 Inaugural Committee should be denied.

DATED: June 20, 1997

Respectfully submitted,

NIELSEN, MERKSAMER, PARRINELLO, MUELLER & NAYLOR, LLP

JAMES R. PARRINELLO, Esq.

Attorneys for Respondents Russell Colliau, Tom Cooper, Martin Wilson, The Pete Wilson Campaign Committee and The 1991 Inaugural Committee

(3)

Supreme Court, U.S.
FILED
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CASE # 96-1856

In The Supreme Court Of The United States

October Term, 1996

ALBIN A. RHOMBERG, JOHN BURNS, MICHAEL BURNS, THERESA REALI, SCOTT KILEY, JACK COOKE, JOSEPH SCHEIDLER, AND ESTATE OF JOHN SZABO,*

PETITIONERS

vs.

PETE WILSON; BOB WHITE; MARTY WILSON; PETE WILSON FOR GOVERNOR CAMPAIGN COMMITTEE; PETE WILSON INAUGURAL COMMITTEE; RUSSELL COLLIAU; KAREN MCGAGIN; TOM COOPER; DUANE LOWE; MONTEY HENSLEY; JAMES PENNELL; R. BARTUCCO; J.E. EVERETT; P.D. HARDER; W.E. MACDONALD; A. PEREZ; D.H. PETERS; PETER OSTERGAR; DANIEL LUNGREN, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; CITY OF SACRAMENTO; GREGORY TWILLING; & P. DOWDEN,

RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY
And Appendix

JAMES JOSEPH LYNCH, JR
ATTORNEY AT LAW (SBN 85805)
1562 RESPONSE RD., SUITE 3103
P. O. BOX 336
SACRAMENTO, CA 95812-0336
OFFICE: (916) 448-7871
FAX: (916) 448-0549

COUNSEL FOR PETITIONERS

* The following dropped out in the lower courts: Charles Shunk, Richard Szabo, and Laurette Elsberry.

36 pp

THE QUESTIONS PRESENTED FOR REVIEW

1. Was recusal required where, prior to the filing of the lawsuit, the trial judge was an attorney for one Respondent for a significant portion of his legal career, and another Respondent, as U.S. Senator, played an essential and active role in the judge's nomination to the U.S. District Court?

2. Do Catholics, who believe in the sanctity of human life, have standing to assert the rights of the Unborn where, in their own Cathedral, they are arrested for praying for their faith, the Unborn, and the repentance of a pro-abortion governor-elect?

3. Are the Unborn "persons" in the Constitutional sense by virtue of the term "Posterity," as used in the Preamble of the Constitution of the United States, and therefore entitled to defend their lives, and to be defended by third persons, such as the Petitioners in this case?

4. Are Penal Code §§ 145 and 302 repugnant to the 1st Amendment when used to arrest and remove Catholics, who believe a pro-abortion governor-elect celebrating his inauguration in their Cathedral is a sacrilege, praying for their faith, and the repentance of the governor-elect, in the absence of violence or threats thereof?

5. Is there sufficient evidence raising genuine triable issues of fact that either Pete Wilson, Robert White, or both, deprived Petitioners, or caused Petitioners to be deprived of, federally protected rights in the arrest and removal of Petitioners from a Cathedral by virtue of their personal presence, right of control over other Respondents, and direct evidence they controlled the activities of other Respondents?

6. Does good faith depend on the facts observed in the arrest of Catholics in their Cathedral, rather than on the status of state law or the good faith of another person?

7. Did the trial court mislead the jury by following its decision on cross-motions for summary judgment, thus precluding the jury from considering the rights of the Petitioners to be present in the Cathedral to protect their religious beliefs, the rights of the Unborn, and their standing to protect the rights of the Unborn?

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CASE # 96-1856

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Vs.

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RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY

STATEMENT IN REPLY

A. STATE RESPONDENTS (PETE WILSON, DANIEL LUNGREN; STATE POLICE OFFICERS)

Respondents claim, in a letter, that petitioners "have failed to cite any conflict between the circuits, and therefore no reason exists for granting certiorari." One ground for review is a conflict between the decision reached and decisions of this court. Rule 10.1(c). The present case, of first impression, involves the arrest of people for praying in their church. Most people would understand the arrests are bad, but it requires this Court to settle that important First Amendment question. Moreover, this is the first case to bring to this Court's attention express words in the constitution which arguably apply to the unborn as person in the

constitutional sense.

B. CITY RESPONDENTS (CITY OF SACRAMENTO, DOWDEN, AND TWILLING)

City respondents have filed a notice of appearance and waiver of Opposition, unless this court requests one.

C. COMMITTEE RESPONDENTS (ALL OTHERS)

1. Introduction

The Committee has filed and served a Brief In Opposition (BO). Petitioner will address material points in the Opposition that mischaracterize the evidence, proceedings, and Petitioners' theory of the case.

Committee characterizes Petitioners as "anti-abortion protestors." (BO, p. 4, 6.) In fact, they are Catholics, who uphold the pro-life teaching of the Church.[1] (Pet., p. 5.)

Committee asserts, without citation to the record, that "The Governor-elect had no active role in the service; he was merely an attendee." (BO, p. 4.) Petitioners object to arguments in behalf of the Governor-elect by Committee because they do not represent him; the Attorney General of California represents him. Without waiving the objection, the claim is inconsistent with the views of the public (Pet., p. 3, fn. 3.), and his direct control over the persons who organized, planned, and implemented the program. (Pet. 27-28.) It is inconsistent with his own personal attempts to make everyone sit down. (AER, pp. 389, 684, 686, 687-88.) Finally, the most damming evidence comes from a member of his own staff, Respondent Pennell, that Wilson gave the order that started the arrests. (AER, pp. 462, 515.)

Respondents correctly note the attendance of persons at a meeting in which Colliau was instructed on his duties (BO, p. 5.), but omits that Msgr. Kidder indicated, at the meeting,

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[1] The fact that an issue may have a religious component does not preclude civil enforcement. (Pet., p. 3, fn. 4.) In fact, the Church's teaching is consistent with other religions. For instance, Premier Benazir Bhutto, a Muslim woman, urged delegates to the 1994 Cairo Coference on Population to abandon consideration of abortion. *Western delegates try to defuse abortion furor at population conference*, Knight-Ridder/Tribune News Service, 9/5/94 p0905K7263; see also, 2 Encyclopedia Judaica, Abortion, pp. 98-101 (1972)

he did not want any arrests. (AER, pp. 869, 1166.) Bishop Quinn personally asked local authorities to drop the charges and then apologized to the arrestees. (Reply Appendix (RA), p. A13; AER, p. 1022.)

Respondents claim that "Monsignor Kidder was present during the meeting. He testified at trial that he left security issues such as these to the discretion of the authorities. The Church would take no part, leaving the decision to arrest protestors in the discretion of the civil authorities. Bishop Quinn concurred that such decisions were up to the civil authorities." (BO, p. 5-6.) Monsignor's testimony is reconciled by the fact that civil authorities, in order to protect a governor-elect, must necessarily have discretion to deal with violence. However, whether a prayer in a church is disruptive is a decision the clergy, not peace officers, must make. (Pet., p. 26.) Indeed, Respondents concede that when they initially tried to move the petitioners, the Clergy moved the VIP section instead. (BO, pp. 9; AER, pp.868, 506, 508, 680.) Neither the Bishop nor Msgr. Kidder considered Petitioners' activities disruptive. (AER, pp. 485, 679; RA, pp. A10, A22.)

Respondents claim that Rhomberg and others "helped draft several **threatening** letters to the Governor-elect." (BO, p. 6.) Respondents then take four quotes from these letters (BO, pp. 6-8.), the worst of which says, "If you choose to ignore the moral issue we defend, *you can be assured of* continual, and relentless embarrassment and confrontation through the **lawful use of public protest**:...." (BO, p. 7.) Lawful public protest is permitted. E.g., 1st Amendment (Right to petition); *Magna Carta* (1215), Art. 61.[2] In all of the words quoted, **there is not one single word of violence**!

Respondents' claims that prayers disrupted the service

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[2] "And if we do not correct the transgression, ... within forty days, reckoning from the time it was brought to our notice ... the aforesaid four barons shall refer that case to the rest of the twenty-five barons and those twenty-five barons together with the community of the whole land shall distrain and distress us in every way they can, namely, by seizing castles, lands, possessions, and in such other ways as they can, saving our person and the persons of our queen and our children, until, in their opinion, amends have been made; ..."

are but a legal conclusion unsupported by any evidence. (BO, p. 9.) Respondents concede that Colliau acted on his own without indications from the Clergy the prayers were disruptive of the service. (BO, p. 9, middle paragraph.)

2. Tom Cooper

Respondents claim that Cooper was a volunteer and not directly responsible for Rhomberg's arrest. (BO, p. 10, 17.) Tom Cooper was responsible for the Event and reported directly to Clarey and M. Wilson. (AER, pp. (Cooper) 93-95, (McGagin) 100-01, 105-08, (M. Wilson) 79, 671, 1249-50.) As supervisor present at the event[3] (AER, p. (Clarey) 888; RA, A-22.), he had the ability to stop the arrests. By his acquiescence, he approved and ratified the arrests.

3. Martin Wilson

Respondents concede that M. Wilson was Director of the Inaugural Committee, and personally present, but claim he had no contact with Rhomberg.[4] (BO, p. 10, 17-18.) As a senior supervisor, personally present, he had the ability to stop the arrests, but did not. By his acquiescence, he approved and ratified the arrests.

4. The Campaign Committee

Respondents claim that the Campaign Committee was not the alter ego of the Inaugural Committee or vice versa. (BO, p. 11.) The heads of both the Campaign Committee and the Inaugural Committee were the same. Pet., pp. 8-9, 18-19.) It would be unfair to go to judgment against the Inaugural Committee only to find all the funds were with the

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[3] Respondents also claim that no evidence was produced. (BO, p. 17.) Clarey was asked to identify 4 people, on Videotape of the Event, and she unequivocally identified two, one of whom was Cooper. (RA, p. A23.) Plaintiffs mooted the conspiracy issue by dismissal. Plaintiffs submitted on Cooper's supervisory position, i.e. he did not personally arrest, but he had the authority to control and prevent the arrests.

[4] As with Cooper, the references to the Record for M. Wilson are not to evidence, but the separate statement of disputed facts which identifies each side's position on each fact, with citations to evidence. The defendants did deny participation in a conspiracy, a negative pregnant (*E.g., Mahanor v. United States*, 192 U.S. F.2d 873 (1st Cir., 1951).), but do not deny participation at the Event, in one role or another.

Campaign Committee and unreachable for lack of judgment against it. Stated otherwise, if they funded the event, they controlled it. To that extent, the participation of the policy makers would be sufficient to hold it liable.

5. Colliau and the Inaugural Committee

Respondents concede that the Event was a public one, and not strictly a Catholic one by virtue of the presence of other clergy, not necessarily even Christian. (BO, p. 4.) Petitioners concede there was a unanimous verdict. However, the judge did not allow plaintiffs' jury instructions regarding protected speech— prayer— at a quasi-political event in a public forum, thereby allowing the jury to consider the prayers a wrongful act. This misdirection of the jury is material requiring reversal. (Pet., pp. 22-30.)

In summary, what Respondents have tried to do is paint themselves as "straight arrows" and Rhomberg, and the other Petitioners, as "the bad guys." The court should ignore the character evidence. (F.R.E., R. 608.)

6. Summary of Uncontested Facts

The salient, material and uncontroverted facts are these: On, Sunday morning, January 6, 1991, there was a quasi-religious service in a Catholic Cathedral open to the public. There were clergy from many faiths, including non-Christian faiths,[5] to pray for Governor-Elect Wilson's new administration. There were security arrangements, but the church made known its intentions with respect to arrests. Activist Catholics did not want him honored there, and informed him that they would continue to pray until he changed his mind about abortion. He went there. They prayed for him. He had them arrested. No violence was threatened or done by petitioners at the event.

The arrests were repugnant to the First Amendment. The Court should overrule Roe v. Wade, the issue that led to the arrests because, based on a fresh approach to the is-

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[5] Petitioners hasten to add that non-Christian participation in Inter Faith services in the Cathedral is not bad. Their sole concern was a proponent of abortion in the Cathedral. The broad range of clergy is simply evidence that the Event transformed the Cathedral into a public forum.

sues, it appears that the unborn are a member of posterity.

ARGUMENT IN REPLY

I.

THE PETITION, LIBERALLY READ, STATES WHY RHOMBERG'S CLAIM OUGHT TO BE REVIEWED

A. INTRODUCTION.

Committee makes two fundamental claims. "[T]he petition ... contains no explanation whatever as to why Rhomberg believes the grant of summary judgment was improper. Nor does the Petition make any specific claim of error as to the jury verdicts." (BO, p. 12.)

The petition, on behalf of all petitioners, including Rhomberg, sets forth a number of reasons for error by the trial court, including: standing; whether the unborn are persons in the constitutional sense; the right to pray in the Cathedral during the event; and, the application of California Penal Code sections 145 and 302. (Pet., pp. 17-26.) The adverse ruling dismissed, Pete Wilson, Bob White, M. Wilson, and Tom Cooper, supervisors with power to stop or control the arrests and present at the Event thereby prejudicing Rhomberg. (Pet., pp. 27-28.) Jury instructions, consistent with the pretrial rulings, were given to the jury, thereby further infecting the process, especially leaving in the jury's mind that praying in one's own church was conduct justifying an arrest. (Pet., pp. 28-29.)

As Rhomberg has met his burden to show prejudice as to Committee, this Court should grant *certiorari*. As the only request for dismissal is that of Committee as to Rhomberg only, the Opposition is a negative pregnant justifying the grant of review as to all other issues and petitioners.

Petitioners will address each of the other issues seriatim.

B. RESPONDENTS MISCHARACTERIZE THE REASONS FOR RECUSAL, AND TIMELINESS

Respondents claim, "Prior government service precludes a District Judge from adjudicating cases only where he or

she has served in government service, and in that capacity participated as counsel, advisor, or material witness concerning the proceeding or expressed an opinion concerning the merits of the controversy. 28 U.S.C., § 455(b)(3).[6]" (BO, p. 13.) That is an incorrect statement of the law, and does not reflect the position of Petitioners.

The basis for recusal was that of appearances of impropriety. (28 U.S.C., § 455(a).) Subdivision (b)(3), cited by Respondents, certainly sets out a per se rule of recusal where there is personal involvement. But even in the absence of personal involvement, recusal appears to be required in a case "... which his impartiality might reasonably be questioned" (28 U.S.C., § 455(a).) This is clearly such a case.

While it is true the trial judge had no personal involvement in the case, it is equally true the Event occurred within a year after he left City. His career was virtually all City service, with but a few years with the U.S. Attorney's Office and a year of private practice. Given about 12 years of service to the Defendant, in a fiduciary capacity, the appearances were such, in a First Amendment Case where other judges were available, that the case ought never to have gone to Judge Burrell. The second reason for recusal is his then recent involvement with Pete Wilson in the nomination process that put him on the Bench, with one of his first cases involving Pete Wilson. In essence, because of Defendants Wilson and City, there is an appearance of "a fox guarding the hen house," and it was, and is, not fair. (Pet., pp. 16-17.)

Respondents also claim the motion was untimely. (BO, p. 15.) The first suggestion of recusal was a document, marked urgent, filed February 24, 1994 that requested the judge consider his relationship with the defendants. The document noted the association of new counsel and explained plaintiffs became aware of the relationships with the Defendants only since new counsel came on the case. (AER, p. 59.) When no response was forthcoming, Plaintiffs made a formal motion. (Id, p. 54-59.) Between his assignment to the case and the suggestion he recuse himself, the judge

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[6] The section, with history, is set out in the Appendix to this Reply.

took no active part in the case in any material and meaningful way. Chief Magistrate-Judge Moulds handled all discovery, and discovery disputes. (Record below.)

First, there is no record the judge made a full disclosure of his relationship with the Respondents which precludes a waiver. (28 U.S.C., § 455(e).) Secondly, the motion was not made after "substantial **judicial** time has been devoted to the matter", such that the motion should be deemed timely. (Id, subd. (f).) Accordingly, the motion was timely.

C. RESPONDENTS ARGUE THE MERITS RATHER THAN WHETHER REVIEW IS REQUIRED ON THE APPROPRIATENESS OF GRANTING SUMMARY JUDGMENT

Respondents set forth the rules for granting summary judgment. Clearly, Petitioners were required to come forth with evidence to demonstrate there was a genuine triable issue of fact. However, Respondents concentrate on what their evidence proved, rather than demonstrating why Petitioners' evidence fails to raise a genuine triable issue of fact, as presented in the Petition. (BO, pp. 15ff; Pet., pp. 27-28.)

The judge did not simply reject relevant evidence, he rejected the direct testimony of Respondent Pennel on how the orders were passed from Wilson to the persons who made the arrests based on his own personal observations and participation. (AER, pp. 462, 515.) Similarly, the judge ignored direct evidence against Cooper in the form of deposition testimony by Clarey, Cooper's supervisor, clearly identifying him on video at the event. (RA, p. A22.)

The Judge should have denied motion. The order prejudiced Petitioners, including Rhomberg, by denying them an opportunity to vindicate their claims against the dismissed Respondents. It also prejudicially shaped the case to preclude Petitioners from arguing material facts and theory to the jury consistent with precedent from this court.

A review of this case is required because of the importance of the First Amendment values held sacred by this Nation, and because of the context in which it arises: Whether the Unborn have the right to be heard through those willing to vindicate the Constitutional rights of the

Unborn.

D. The Pretrial Rulings Prejudiced Petitioners at Jury Trial

Respondents claim that Rhomberg made no objections to the jury instructions or the special verdict. (BO, p. 20.) That is grossly misleading. The court already announced its intent with respect to religious beliefs and standing in the memorandum on motions for summary judgment. To emphasize the point, the judge combined the motion for reconsideration of these issues with the pre-trial conference. The court had made up its mind. (Pet., p. 29.) Indeed, both Attorney Carey (AER, p. 1503-04) and then Pro se plaintiff Rhomberg (AER, p. 1507-08.) tried to address these issues, but the court cut them off summarily with, "cite me a case." These objections, just before submission to the jury, appear sufficient to comply with Rule 51.

Based on the cases cited in the Petition at page 29, this court ought to grant the petition as to this issue.

CONCLUSION

WHEREFORE, for all, or any one, of the foregoing reasons, this court should grant the writ of *certiorari* to the Ninth Circuit, and summarily reverse and remand, or set the matter for briefing, argument, and such other and further relief as the court deems just under the circumstances.

Dated: September 18, 1997

Respectfully submitted,

James Joseph Lynch, Jr.
Attorney at Law (SBN 85805)
P.O. Box 336
Sacramento, CA 95812-0336
Office: (916) 448-7871
Fax: (916) 448-0549

Counsel for Petitioners

APPENDIX

EXCERPT FROM TITLE 28, U.S. CODES

SEC. 455. DISQUALIFICATION OF JUSTICE, JUDGE, OR MAGISTRATE

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association,

or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

(June 25, 1948, ch. 646, 62 Stat. 908; Dec. 5, 1974, Pub. L. 93-512, Sec. 1, 88 Stat. 1609; Nov. 6, 1978, Pub. L. 95-598, title II, Sec. 214(a), (b), 92 Stat. 2661; Nov. 19, 1988, Pub. L. 100-702, title X, Sec. 1007, 102 Stat. 4667.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., Sec. 24 (Mar. 3, 1911, ch. 231, Sec. 20, 36 Stat. 1090).

Section 24 of title 28, U.S.C., 1940 ed., applied only to district judges. The revised section is made applicable to all justices and judges of the United States.

The phrase "in which he has a substantial interest" was substituted for "concerned in interest in any suit."

The provision of section 24 of title 28, U.S.C., 1940 ed., as to giving notice of disqualification to the "senior circuit judge," and words "and thereupon such proceedings shall be had as are provided in sections 17 and 18 of this title," were omitted as unnecessary and covered by section 291 et seq. of this title relating to designation and assignment of judges. Such provision is not made by statute in case of disqualification or incapacity, for other cause. See sections 140, 143, and 144 of this title. If a judge or clerk of court is remiss in failing to notify the chief judge of the district or circuit, the judicial council of the circuit has ample power under section 332 of this title to apply a remedy.

Relationship to a party's attorney is included in the revised section as a basis of disqualification in conformity with the views of judges cognizant of the grave possibility of undesirable consequences resulting from a less inclusive rule.

Changes were made in phraseology.

AMENDMENTS

1988 - Subsec. (f). Pub. L. 100-702 added subsec. (f).

1978 - Pub. L. 95-598 struck out references to referees in bankruptcy in section catchline and in subsecs. (a) and (e).

1974 - Pub. L. 93-512 substituted "Disqualification of justice, judge, magistrate, or referee in bankruptcy" for "Interest of justice or judge" in section catchline, reorganized structure of provisions, and expanded applicability to include magistrates and referees in bankruptcy and grounds for which disqualification may be based, and inserted provisions relating to waiver of disqualification.

CHANGE OF NAME

Reference to United States magistrate or to magistrate deemed to refer to United States magistrate judge pursuant to section 321 of Pub. L. 101-650, set out as a note under section 631 of this title.

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment by Pub. L. 95-598 effective Oct. 1, 1979, see section 402(c) of Pub. L. 95-598, set out as an Effective Date

note preceding section 101 of Title 11, Bankruptcy. For procedures relating to Bankruptcy matters during transition period see note preceding section 151 of this title.

EFFECTIVE DATE OF 1974 AMENDMENT

Section 3 of Pub. L. 93-512 provided that: "This Act (amending this section) shall not apply to the trial of any proceeding commenced prior to the date of this Act (Dec. 5, 1974), nor to appellate review of any proceeding which was fully submitted to the reviewing court prior to the date of this Act."

CROSS REFERENCES

Disqualification of trial judge to hear appeal, see section 47 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 460, 656 of this title; title 38 section 7264.

DEPOSITION REPORTERS' TRANSCRIPTS
MSGR. KIDDER

Volume I

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Q Do you recall the person saying these words, "And may Governor-elect Wilson denounce his pro-abortion position which has made this ceremony a sacrilege"?
A That may very well have been what it was. I don't recall.
Q If the person had said that, would you consider that a prayer?
A Not by its nature. It could be a wish or a prayer, I guess. I don't know to whom he was directing it.

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[105]

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Q Right. In earlier discussions you indicated that there were certain policies within the church for disruptions. First you ask the person to stop. Then, if he doesn't stop, you ask him to leave or you -- you

ask him to leave. And then, if he doesn't leave, you then -- there may be a time that you ask to have the police called and have him arrested.
MS. McEVOY: Removed.
THE WITNESS: **If the disruption continues. Not arrested, removed, and I've insisted on that all day.**

[114]

Volume II

Q You've testified about what Mr. Laubacher said during your discussion with him. What, if anything, did Mr. Rhomberg say during that discussion?
A Mr. Rhomberg did most of the talking. I

[138]

remember a large portion of it being the evil of abortion, which both Father McFarland and I both readily agreed with. He also presented materials to us about the evil of abortion with which I was already pretty familiar and so was Father McFarland.
I think the discussion centered very much on whether we were honoring Mr. Wilson or not as a person. I believe I indicated earlier we were acceding to his wishes as Governor-elect of California, not taking any kind of agreement on any political stance of his any more than we did with any other governor.

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[139]

TRIAL REPORTERS' TRANSCRIPTS
MSGR. KIDDER

Q And did you participate in those discussions?
A Yes. I explained --
Q Go ahead.
A I explained what the policy had been from my experience as pastor of the cathedral and how to handle situations where people would be disruptive.
Q One of the subjects of that meeting, I take it, was the question of possible disruption or

interference somehow with the event on the 6th?
A That's correct.
Q And at that meeting did you indicate what the cathedral's policy was in terms of how to deal with those issues?
A I gave them our experience which was -- pardon me -- our policy which was that if someone does something that's disruptive, that someone approach that person and ask them to stop. If the person stopped, that would be the end of it. If the person didn't stop, that the police could be called to intervene.
Q And did you discuss policy in terms of

[885]

removal of people from the cathedral?
A Yes. In the sense it would be up to the police to make a removal. We would ask people to leave. If they didn't, the person -- ask the person to stop, but ask the person to leave if the person did not stop the disruption.
Q Was the policy of the cathedral that you discussed at the meeting in favor or against arrest of persons who might cause a disruption?
A I would say that was left in the hands of the police. **We would call for intervention. We would not be making an arrest -- party to an arrest ourselves in those kinds of situations.**
Q Let me diverge just a moment to another issue.
At that time did the cathedral have what would be called an open-door policy with respect to the right of people of the Catholic faith to enter the cathedral and pray?
A That's correct. Open-door policy? Is that what you asked?
Q Yes.
A Yes.

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[886]

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Q What did they -- well, could you just simply summarize as best you can what they said and what you said and what Father McDermott said at the meeting?

A Their request, as I understood it, was that the event should be canceled because in their mind Bishop -- pardon me -- Governor Elect Wilson had a prochoice stance. And that in our having the service there, we are honoring him. And we disagreed with that.

We tried to emphasize that he was the elected governor-to-be of California and that as an elected official and in his capacity as Governor Elect, that **we were doing a good civic thing** by allowing a prayer service to take place as part of his inaugural event.

Q Did they say to you that they felt that having the service in the cathedral would be a sacrilege or a scandal?

A I don't recall that. If they did, I guess I wouldn't have entertained it for too long. However, to summarize, we did try to listen to what their concerns were and emphasize that they did have a hearing from us and that I would do what I would consider the prudent amount of

[907]

consultation.

Q Now, did you do that consultation?

A Yes.

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Q Did there come a point in time when you received a telephone call from a woman by the name of Laurette Elsberry concerning the service?

A Yes, there came a time. When that time was, I don't remember exactly. It was late at night around 11:30 or so, but I don't remember what day.

Q Did you know her to be affiliated with Mr.

25 Rhomberg and Mr. Laubacher?

[908]

1 A With the former, but not with the latter.
2 Q With Mr. Rhomberg?
3 A Yes.
4 Q And did you discuss with her what word you
5 had gotten back from the bishops?
6 A Yes, I did.
7 Q What did you tell her in that regard?
8 A **I told her that we were not honoring the**
9 **Governor Elect as a person**; that this was not in
10 any way condoning a prochoice stance, but that it
11 **was a response as citizens to our Governor Elect.**

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[909]

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15 Q Did there come a time that morning prior to
16 the ecumenical service when you personally
17 approached that group?
18 A Yes. When it was pointed out to me that
19 they were there, I went down and let them know
20 that those pews were reserved and asked them to
21 move back.
22 Q Did they move back?
23 A No.
24 Q Did you tell them who the pews were reserved
25 for?

[915]

1 A I certainly did not in the beginning.
2 Whether I did later, I don't remember.
3 Q Was Mr. Rhomberg among the group that you
4 spoke with?
5 A Yes.
6 Q And you know Mr. Rhomberg?
7 A I do.
8 Q You knew him before the ecumenical service?
9 A Yes.

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[916]

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Q BY MR. PARRINELLO: Did they move --
A No.
Q -- in response to your request?
A No.

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[917]

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Q BY MR. PARRINELLO: **Did you confer with Bishop Quinn after you saw these people in the front who refused to move?**
A **Yes, I did.**
Q **And did Bishop Quinn give you any instructions** as to how to deal with the situation?
A Not instructions as such. In discussing it, he stated his preference that the -- pardon me. Let me put it this way: I told him that they were in that location that was intended both for the Governor and the newly appointed senator, and that I would see as a possibility having the Governor sit elsewhere.
And **he stated his preference that rather than to force these people to move, that he would have preferred to have the Governor sit in another location.** I went out and expressed that to the proper authorities because I believe that to remove somebody from that location when they hadn't done anything particularly wrong from a standpoint of disrupting anything at that time

[919]

would not have been wise.
Q At that time did you have any information that those people might attempt later to disrupt the service, the ecumenical service?
A I would say all we had was any kind of speculation. **Nobody told me or threatened me** in any way that I can recall that they were going to do anything.

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[920]

DEPOSITION REPORTERS TRANSCRIPT
BISHOP QUINN

Q. Okay. Do you recall what the substance of Mr. Laubacher's objection was?
A. The objection was that the governor had taken a pro-choice position on abortion and that, therefore, we shouldn't have a prayer service.
Q. Okay. At the time were you aware of Governor Wilson's position on that?2
A. On abortion?
Q. Yes.
A. Yes.
Q. Did you have a disagreement with the objection that in fact Governor Wilson had that position?

[51]

A. I – did I disagree with the objection?
Q. No. Did you voice agreement or disagreement with the fact when presented to you that in fact Governor Wilson was pro-choice?
A. I – when the whole thing was introduced, the idea of a prayer service, it didn't enter into my mind a particular position that a candidate would take. It was just that every administration needs all the help it can get in the way of prayer, and so that didn't enter my mind. When the specific objection was brought up, I thought that to have a prayer service for a political office holder was a good thing, that it wasn't endorsing his position, because every government official that we elect has some positions that we're opposed to. But the church prays for them, and so I didn't think that it was inappropriate to have the prayer service.

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[52]

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What was the substance of the objection why they did not want the cathedral used?

A. Well, because I guess someone who took a position that was against what the church's position was should not have a prayer service in the cathedral.

[55]

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Q. BY MR. CAREY: Were you ever aware that one of the individuals arrested on January 6, 1991 -- or were you aware that there was an individual that was arrested at the cathedral who was not part of this lawsuit?

A. Yes. Subsequent to the case, I heard that, yes.

Q. Okay.

A. I don't know about whether he is part of this lawsuit, but I don't think he was part of the group that was there for this -- these -- this purpose.

Q. Okay. We'll get to what that purpose was. But did you talk to this individual?

A. I did subsequently, yeah.

Q. Do you know him to be Patrick McKay?

A. Yes.

Q. Was he a regular parishioner at the time?

[60]

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A. I didn't know prior to that.

Q. Did he indicate to you what his purpose was for being at the cathedral on that day?

A. He said he was just going to mass.

Q. And did he describe to you the circumstances under which he was arrested?

A. If he did, I don't recall. I think he just said he was arrested and put into the police van. That's about all I remember him telling me.

Q. Did you take any steps after hearing that he was arrested to contact the people who organized the event?

A. No, not the people. That would have been the interfaith clergy and whoever worked with them. I

didn't contact them.
Q. Okay. Did you contact -- did he indicate who arrested them?
A. If he did, he said the police. That's all.
Q. Okay. Did you contact -- other than -- well, did you contact the police regarding his arrest?
A. I contacted -- I tried to contact the District Attorney's office or the sheriff. I remember going to the jail, asking whom would I contact, that we had not pressed charges, and did not know of the arrest until after the event.

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[61]

*****

Q. Okay. Do you recall in particular what the concern was regarding the scandal that was expressed?
A. I guess the concern would have been namely that we were having a prayer service for a government official who took a position that was opposed to an important position of the church.
Q. Do you think Father McDermott indicated to you at that meeting that he had consulted any church authorities?
A. Not that I recall.
Q. Okay. Did he indicate he had consulted canon law on the matter?
A. He may have, but I don't remember.
Q. That was Father McDermott did you ask?
A. Correct.
Q. Okay. Other than Father McDermott, Monsignor Kidder and Father Steinauer, did you have any other discussions regarding this event with other church officials?
A. The only one I remember was Cardinal O'Connor called me because he was chair of the pro-life activities for the bishops' conference, the United States Bishops' Conference, to just say that he had had someone submitting a complaint to him, and he wanted to get my position on it. And I told him on

that occasion just exactly what I've said here today.
Q. Did he -- did he identify who the complaint was

[68]

from?
A. No, I do not think he did.
Q. Okay. Do you recall how soon before the event this occurred?
A. That was just within -- within a week or ten days.
Q. You indicated he had an official capacity. What was that?
A. He was chair or the episcopal moderator of the pro-life committee of the National Conference of Catholic Bishops.
Q. Now, in that position does he have any authority over what takes place in any other diocese?
A. No.
Q. Okay. What is -- do you know what his authority is as chair episcopal moderator of pro-life?
A. It's to help the bishops address this whole question. That's what the committee does. The NCCB conference doesn't really have jurisdictional authority over what individual dioceses do. They're all independent.
Q. In the conversation with him, did he indicate what his policies are in his diocese?
A. He didn't speak to me in terms that he was objecting to it at all. He was actually asking for my mind on the matter because a complaint had been brought to him. And if I remember correctly, to

[69]

answer your question, as close as he got to what he does in his own diocese, "I know that I give invocations for mayors when they are elected, and they don't always hold the positions that I hold." I recall him saying that. So he was understanding what we were trying to do there.

Q. When he was indicating invocations, was he indicating at the -- the actual swearing in?
A. I think at the swearing in, yeah.
Q. But at that time he didn't indicate to you anything regarding having any ecumenical event for these public figures?
A. No, I don't think so.
Q. And what was the -- did he indicate what the substance of the complaint was that he had received?
A. I think the way he put it to me was that he had a complaint that they were having a prayer service for the governor who had a pro-choice position with -- that was the complaint brought to him. I told him my mind on it was what I have explained to you today, and he took that as a position and says that's fine.
Q. Okay.
A. He didn't make a judgment on it.
Q. Was there any discussion between the two of you regarding what would be the proper use of the cathedral?
A. No.

[70]

Q. So it would be fair to say he simply addressed the specific complaint?
A. Yeah.
Q. Okay.
A. He asked about the complaint, what my mind on the thing was.
Q. Okay. Did he indicate that part of the complaint was that the -- a mass would be changed?
A. No. I don't think he brought that up. I may be mistaken, but I don't remember that. I think it had to do with the abortion issue.
Q. Did he indicate to you that the complaint was from somebody in the Sacramento diocese, or elsewhere?
A. I think he indicated it was from Sacramento.
Q. Okay.

A. Don't know that it -- I can't recall that it was outside of Sacramento.
Q. Okay. And did he indicate the purpose of his call besides that he had received a complaint?
A. That was the only purpose.
Q. Okay. You indicated that he took the information. Was it your understanding that he just wanted the information regarding the event?
A. Yeah. I think most bishops who are in a position like he is, or in any position, want to follow through with complaints. They just don't disregard them. He wanted to know my side of the

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problems, so I gave it, and that was sufficient for him.
Q. Okay. And did he indicate that he would be doing a further examination of the complaint?
A. No.
Q. Okay. Did you receive any correspondence from any other church official other than Cardinal O'Connor?
A. Not that I recall.
Q. Okay. Prior to the event, did you speak with the Papal Nuncio for the United States?
A. I don't remember talking to him on this subject. As you know, we're talking about three years ago, so I could have forgotten, but usually I remember something like that. He's talked to me on other subjects, but I don't recall it on this instance.
Q. Were you ever contacted by any other official in Rome?
A. No.

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Q. Now, I'd like to address as bishop in the diocese of Sacramento, are you aware of the frequency of disturbances in the cathedral, what that frequency

is?
A. Well, sort of organized disturbances are very rare where it involves more than one person, but you do have disturbances. Sometimes people come in that are mentally unbalanced, unfortunately, and they may shout out. That may happen.
In any given church you may have parishioners having difficulties. That might happen in the cathedral. We have a gentleman that does that once a week, but we all understand him. He is a good person.

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Q. What steps are normally taken by the church officials in the cathedral, if you know, when such a disturbance occurs?
A. Well, in the case I've given, no steps are taken. If you just let him say a few words out loud, then he quiets down, and that's the end of it.
Q. Okay. Other than this individual you're remembering, are there any policies that the -- that you're aware of that the cathedral has for quelling any disturbance?
A. I don't know of any written policies. I think in the cathedral, as in all churches, the idea would be to see if the person is going to quiet down, and then nothing more is done of it. The person persists, perhaps someone would. Oftentimes parishioners around that person will try to shush the person. And if they continue to go, I would say the practice would be to -- an usher would probably come up and ask the person to be quiet.
Q. Were you ever aware of any circumstances where the police have had to come in and remove people during a service?
A. No, not when I have been present. And have I heard of any? I think there have been occasions when the police have been called, but I haven't noticed it -- I didn't understand it -- that it was happening in the church proper. Maybe in the

vestibule. I don't know -- recall cases where police

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have actually ejected people, but police have been called when someone just absolutely refuses to behave. And on rare occurrences it's happened.

Q. Okay. Now, for the event of January 6, 1991, prior to the event, were you made aware of any discussions regarding the possibility of disruption?

A. Yes.

Q. And when was that?

A. I would say within about two weeks before the event.

Q. Okay.

A. Not so much that we had an idea disruptions would take place, but that we could anticipate them from having known that things like this had happened elsewhere and in the cathedral, but not so much in the church but in front of the church.

So it was anticipating that these might happen. I don't remember any overt threats that have happened, although they could have been, because I was away in that week before.

Q. Okay. Were you made aware in that two-week period that individuals might be in the cathedral, not that there was a threat, but that it was a possibility?

A. I think I was.

Q. Okay. And what was discussed regarding that possibility?

A. Not much was discussed as to, you know, what

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would our response be, until probably the morning of the event itself. And we knew that with the high government officials present, that there would be security there, and I guess we just counted on them to do what they had to do in their jobs. And the provision we made -- as I remember it, I was just getting this on the morning of the event, was that ushers would be asked to handle anything that did

happen.
Q. Did anybody -- who indicated that to you?
A. Monsignor Kidder.
Q. And did he indicate what ushers these were?
A. I don't think he did by name.
Q. Can you -- well, what did you understand him to mean by "ushers"?
A. I would think the church ushers. I'm not sure. He may have told me there was some special ushers brought in. I just don't recall that.
Q. Okay. Did you -- in your discussion with Monsignor Kidder, was there any discussion regarding arrests?
A. Not that I remember a discussion about arrests. About removal, I think that possibly came up, but not arrest.
Q. Did you express any opinion at that time as to whether arrests should take place?
A. No. I don't -- I did not.
Q. Did Monsignor Kidder?

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A. Not that I remember. I really don't remember us getting into arrests themselves. When you're thinking of disruptions in the church, you're thinking more just quieting the disruption.
Q. Did Monsignor Kidder indicate to you that he was concerned with the possibility of arrests?
A. He may have. I don't recall.
Q. Okay.
A. I think we leave those things in the law enforcement's hands. They're going to do what they think they have to do. The church doesn't work in those terms. When law enforcement is present, that's their judgment.
Q. Well, did you have any understanding for the event that any church officials could intervene in any disturbance?
A. Ushers.
Q. Well, other than --

A. Church officials, you're saying?
Q. Well, church ushers.
A. Yeah. We would understand that they would -- that if something happened, they would do what they always do, what they normally do in a case like that.
Q. Was it your understanding that there were church ushers there, ushers who were regularly there for the church?
MR. PARRINELLO: "There," are you referring to the ceremony on January 6, 1991?

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MR. CAREY: Right. For the event.
Q. Did you have any understanding that there would be church ushers at the event?
A. Yes, I'm sure I assumed that. They are at every service.
Q. Okay. Did you have any understanding that the church policies up until that date regarding the quelling of disturbances would still be in effect for that event?
A. Yes.
Q. Okay.
A. But as I say, this was an unusual situation where you had high government officials present, and so you had security there that would not normally be in the church, but would be there when there were officials.
Q. Were you aware of any instructions given to those security officials regarding the church's policies on quelling disturbances?
A. I don't know for sure, but I would think Monsignor Kidder talked to them about that, telling them what was normally done in church services.
Q. Okay. At that time did you have any understanding of what Monsignor Kidder's authority would be regarding the disturbances?
A. As a pastor of the cathedral, he would have the authority. I'm sure, though, when you bring in the element of law enforcement, that he acceded to their

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authority and their jurisdiction. And I'm sure they consulted with him, and he consulted with them and tried to cooperate.

Q. Okay. Do you have any understanding at that time what the jurisdiction was of these security officials?

A. Do I have –

Q. Did you have any understanding?

A. Any understanding of?

Q. Of the jurisdiction of the security officials in the church, police officers?

A. My understanding at the time, I'm sure, was that they would have to conduct themselves as their profession requires.

Q. At the time of the event, did you have an understanding that if there was a disturbance, people would simply be removed, or did you have an understanding that they might be arrested?

A. If that entered into my mind, I was thinking it would be removal. I don't think arrest entered into my mind one way or the other.

Q. But you understood at the time that these security officers might have that authority to arrest; is that correct?

A. Yes. If I adverted to this concept, I would have realized that, yes.

Q. Did you express any concerns to Monsignor Kidder regarding the fact that police officers or

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security officers would be determining what a disturbance was?

A. I don't think I expressed a concern.

Q. Okay.

A. We tried to handle it as peacefully as possible. We tried to anticipate that. That's why I say the policies would be what normally would be. There was an occasion there where some of the parishioners, or the people there in the church, were

in a position where the government officials were to be, and they preferred not to move. And it was the suggestion to the law enforcement people by Monsignor Kidder, and I agreed with it, that if these people wanted to stay there, see if you could relocate the government officials.
That's the only thing I remember rather clearly that morning.

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DEPOSITION REPORTERS' TRANSCRIPT - CLAREY

Do you recognize that individual?

[71]

A. I can't see his face. No.
Q. You don't recognize him? Okay.
(Discussion off the record.)
Q. BY MR. CAREY: Do you recognize him?
A. Tom Cooper.
Q. We're at 36:24. You recognize that as Tom Cooper?
A. Yes.
Q. Stop it. Did you recognize her?
A. No.
(Discussion off the record.)
Q. BY MR. CAREY: Channel 10, and it's 42 seconds, frame 20. Do you recognize the fellow in the background?
A. No.

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